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LEGAL ASPECTS OF PORT MANAGEMENT

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FOREWORD

(i) There are many publications dealing with the main areas of port organization, operation and development. The legal aspects of port organization and management, however, have rarely been examined, either at international level or in detail. Considering it was time to fill the gap, the UNCTAD Ad Hoc Intergovernmental Group of Port Experts, meeting at Geneva in September 1990 in response to resolution 61 (XIII) of the Committee on Shipping, requested the UNCTAD secretariat to prepare a study on the legal aspects of port activities.

(ii) The paucity of literature in the field is due to several factors. Wide differences exist between countries with respect to port regulations and methods of operation. Corresponding national or local legislation reflects these differences, which complicates the task of preparing documents of international application in the field. Although there are many authorities on the legal aspects of seaborne and overland transport, lawyers working in port law are thin on the ground since only the major ports can offer them employment on a permanent basis. It is therefore not surprising that what has been published on the legal aspects of port activities is generally national in nature and often restricted to specific areas of port management.

(iii) The present study is intended to address the needs of a broad international audience and in particular port officials and managers, including those in developing countries, who are generally not trained in the legal aspects of port activities but must in their work have some knowledge of the law.

(iv) Rather than considering one aspect of port law in depth, it has been considered preferable to make the study as broad as possible, ranging from port organization to land management, and taking in police regulations, operating regulations and the conduct of and preliminaries to litigation. Such an approach necessarily restricts the study to the principal points of the law and to legal principles of interest to a large number of countries. Consequently, additional information will often be necessary to address the specific needs of individual ports. This preliminary study will therefore very probably have to be amplified in the future and further, more detailed studies will probably be required.

(v) In preparing the present study, the UNCTAD secretariat was assisted by Mr. Robert Rezenthel, Secretary-General of the Autonomous Port of Dunkirk, France. The first draft has thus largely drawn on the port organization and the codified system of law prevailing in France. Many countries throughout the world have opted for other forms of national and local organization for their ports and some also have different legal systems, such as the common law system. Thus one country may differ fundamentally from another on such basic concepts as the function of a port, the role of State and municipal authorities, the independence and financing of ports, or even on matters of such importance as public law or private law, the existence or otherwise of public ownership, and so forth. Owing to its international scope, the present study, like other UNCTAD publications dealing with ports, avoids subjective judgements; it seeks instead to formulate recommendations that will respond in particular to the needs of developing countries, following objective discussion of the topics covered. Moreover, the organization and management

of ports - closely linked to the legal system under which they operate - has already been touched on in the UNCTAD report on "The principles of modern port management and organization" (TD/B/C.4/AC.7/13). To prevent the study becoming unwieldy such topics will not be taken up again unless necessary.

(vi) In order to ensure that the study is as truly international as it was meant to be, the first draft was sent for comment to some 10 countries that had earlier indicated their willingness to help in its preparation.

(vii) Subsequently, an informal meeting of legal experts and senior officials attached to those ports was convened in Geneva from 18 to 20 November 1991. Annex 1 gives the recommendations adopted and the list of participants. The recommendations have an impact beyond the context of the study since they provide an outline of what might be said to be a tentative law of ports that could find acceptance at some point in the future and take its place alongside the law of the sea and law relating to overland transport.

(viii) The UNCTAD secretariat cordially thanks all countries and all port authorities and officials who assisted it in its task. The high standing of the participants at the meeting in September 1990 was clear evidence of the importance of the subject for many port officials.

INTRODUCTION

1. Law is traditionally presented as an art and a science. It implies the existence of written or unwritten rules which should be applied to situations that were not necessarily envisaged by those who wrote those rules. Jurisprudence, in other words, the principles enunciated by the various courts of law, has the effect of enabling the laws to be interpreted in the light of the situations encountered. Every legal dispute leads to an evaluation of the situation, and then requires a solution. For example, when any damage is caused to others, the damage must first be established and its cause and extent determined, and then on the basis of these findings, an opinion must be given as to whether there is any liability from the point of view of the rules of law that are in force in the country concerned. If the liability of a third party is involved, that party must be designated by name and his share of liability determined.

2. Port law is different from maritime law. The latter is influenced to a great extent by international law, whereas the former falls basically within the ambit of national law. Maritime law essentially constitutes a branch of commercial law applied to maritime transport. The loading and unloading of vessels are operations that are incidental to the shipping contract, and the relevant legal regime comes under maritime law; on the other hand, the placing of facilities by a port authority at the disposal of a cargo handling company is governed by ordinary law. It is noteworthy that while the functions of most of the ports around the world are on the whole similar, the conditions under which they are performed vary from country to country.

3. In the study entitled "The principles of modern port management and organization" (TD/B/C.4/AC.7/13) it was emphasized that there were two major categories of ports, or rather port authorities, namely, "operating ports", where the port authority supplies and operates the facilities, and "landlord ports", where the port authority supplies and manages the facilities but does not operate them. An intermediate category called "tool ports" has been added, where the port authority supplies users with fully equipped facilities in the same way as some real estate agencies supply their customers with furnished apartments. In addition, the size of the area within which the services are supplied by the port authorities also varies from one country to another.

4. In some instances, the functions of the port authority extend to the full range of services for ships and cargo. In others, it is the State or municipal authority which is responsible for providing certain services, such as the improvement and upkeep of bodies of water, while the port authority administers the key section of the port, alone or with private or non-private operators. One could list a host of examples of different allocations of port functions and tasks. This issue will not be taken up again, although it is important to the subject dealt with in this study.

5. Sometimes there is no specific legal regime in statute or common law for port management. In such a situation, the roles are not defined and this can lead to blockage of operation of the facilities on account of the lack of organization of the port area. The disadvantages caused by the absence or inadequacy of written or common rules of port law include the lack of legal authority of those administering the port facilities, the danger of the

arbitrary exercise of police authority, and the absence of organization of the public service leading to protracted lawsuits over the determination of liability in the event of damage. The legal uncertainty surrounding the management of the port would deter most major potential investors.

6. The study of the legal aspects of port management should enable all the directors, managers and indeed agents of the authorities and enterprises involved in this activity to have points of reference and improve their competence in taking or implementing decisions in areas involving both the institutional aspect (in other words, the legal regime of the port) and the rules governing operation of the port (in particular, police regulations, operating regulations, drafting of standard contracts for the operation of port facilities and equipment, formulation of general conditions for the use of the port industrial area).

7. This study is intended to help countries, and developing countries in particular, to establish or modernize this legislation and these regulations concerning ports. It does not aim to describe in detail the laws and regulations which might be necessary at the national and local levels, taking into account the needs created by the context. Rather, it seeks to give guidelines, recommendations and examples that will enable local officials, alone or with the help of specialists, successfully to update or modernize their national legislation and regulations.

8. This first paper in the area of what we shall call port law should also enable the port authorities to realize how much is at stake and therefore to ensure that their concerns are better appreciated and that the interests of the different agents operating in the port are better protected when any international legal instruments are drafted or, more simply, at regional or intergovernmental meetings on matters having legal implications for port operation.

CHAPTER I

THE SOURCES OF LAW AND THE NATURE OF PORT LAW

9. Port law is a branch of law which makes use of the general principles of law (in other words, law applicable to every situation) and also comprises specific provisions. Every port operation occasions the application of rules that are of a legislative character (this means that they come under a law enacted by Parliament) or regulatory character (which fall within the ambit of a decree or order). The former are issued by the Government and the latter by an administrative authority. In the common-law countries, these rules are derived mainly from usage or jurisprudence. Contractual rules may also be applicable (in other words, provisions contained in contracts).

10. These rules concern not only the performance of operations, but also the relations between the parties concerned. Thus, the rules which apply to relations between the port authority and the shipowner will differ from those existing between the latter and the shipper or cargo handler.

11. Apart from a few enactments which relate specifically to port activities, it is ordinary law which applies to these activities. The sources of port law are national or international in origin. We shall mainly discuss the legal system in force in the countries with statute law, and the French-speaking countries in particular, and then, the system in the common-law countries, in particular British law.

The legal system in force in the statute-law countries and in the French-speaking countries in particular

I. The sources of internal law

12. There are laws and regulations, in other words, instruments that are applied unilaterally (unlike the conventions that are the result of negotiation) and jurisprudence, which is made up of the principles enunciated by the various courts of law. In the system we were going to discuss, statute law comprises more specific principles than are recognized by the British common law system.

A. The laws and regulations

13. Most legal systems are governed by a constitution, which is the supreme law, and by general principles that are inherent in the nature of the political system. The constitutional provisions and the general principles of law set the boundaries of the various laws and regulations adopted by the legislature and by the administrative authority. Where the laws, decrees or orders are imprecise, the rules and principles to which we have just alluded apply on a residual basis. For example, if no law or regulation specifies the terms and conditions of tariffs for port facilities, reference will have to be made to the constitutional principle of equality between users. This principle is inherent in the functioning of every State in modern law, but we shall see that this equality may be subjected to objective discrimination; the imposition of different port charges, for example, is allowed, depending on the conditions of use or the professional categories of users, or specific port charges may be imposed for ships which have the same capacity but are

carrying different kinds of cargo. It happens that in the countries which pursue an advanced liberal policy, no constraints are placed upon port tariffs, which are determined through free negotiation.

14. Freedom constitutes another principle respected by all democratic States. This is not a simple philosophical principle; its exercise produces legal effects. This means that if no prohibition of an activity is expressly provided for in a law or regulation, that activity is allowed within the limits of the other legal principles. Thus, if no law or regulation restricts the conditions of navigation in a port access channel, such navigation will be allowed, provided of course that it does not jeopardize the interests of others. THERE IS NO LEGAL VACUUM if an activity is not specifically regulated. The major general principles of law must, however, be respected when that activity is being undertaken.

(a) The hierarchy of laws and regulations:

15. In those countries where a Constitution stands at the peak of the legal hierarchy, all the various laws and regulations do not have equal legal value. As a rule, in addition to the Constitution and the fundamental principles having constitutional value or recognized by the laws of the country, there is a hierarchy of laws and regulations. In the first place, there are the international conventions and treaties, followed by the laws whose sphere of application comprises the rules essential to the life of the nation, then decrees, orders (ministerial, municipal and so forth), and the various administrative acts. If, for example, a law and a decree are contradictory, the provisions of the law usually take precedence, although there are exceptions.

16. For example, if a law provides that the removal of a wreck from a channel shall be carried out without delay by the port authority and at the expense and risk of the owner of the wreck, whereas a decree (even subsequent to the law) offers the owner the option of abandoning it, in this case the port authority will always be entitled (whatever the owner's decision) to pass the cost of lifting and removal on to the owner.

17. It should be added that in some countries such as Belgium and the Netherlands, the law derives from the will of the people and may not be assessed by comparison with higher provisions. The system in those countries lies between French law and Anglo-Saxon law, where, except in the United States of America, the principle of the hierarchy of laws is unknown.

(b) Specific laws and regulations concerning port activities:

18. In the statute-law countries, in particular, depending on the nature and importance of the provisions enacted, these instruments are sometimes legislative and sometimes administrative. In France, the Seaports Code constitutes the main enactment concerning port development and management. It comprises seven books, which deal with:

- The establishment, organization and development of seaports;

- Port and navigation fees;

- The policing of seaports;

- Dockside Railway lines;

- The organization of work in seaports;

- Ports in the public domain; 1/

- The National Council of Port Communities. 1/

This Code is supplemented by the General Police Regulations for commercial and fishing ports, which are annexed to article R 351-1 of the Code.

19. In Côte d'Ivoire, as in other countries of West and Central Africa, the main instrument concerning port development and management is the "Port Police Regulations". Depending on the regime in question, the autonomous regime of a port is established by legislation or administrative regulations. In the case of the port of Abidjan, its organization is defined by a decree. The Finance Act of 31 December 1970 established it as a public enterprise of an industrial and commercial nature. A decree of 28 November 1980 classifies the autonomous port of Abidjan as a national public enterprise.

20. The preambular paragraphs of regulations (whereas act No. ..., whereas decree No. ...) have no effect on their legality. Their purpose is to specify the context in which the law or regulation is enacted. The references in these paragraphs are often incomplete. It should also be borne in mind that subsequent laws and regulations may supplement, amend or repeal the initial ones.

21. One particular feature which needs to be pointed out in connection with the countries of West and Central Africa is that the laws and regulations prior to independence remain applicable unless they have been expressly repealed (e.g. art. 76 of the Constitution of the Republic of Côte d'Ivoire).

22. In Cameroon, Act No. 71/LF/5 of 4 June 1971 establishes the Cameroonian National Ports Office, which is a public undertaking of an industrial and commercial nature, responsible for ensuring the equipment, administration, management and operation of the country's ports. Decree No. 72/DF/201 of 17 April 1972 lays down the organization of the Office and the conditions under which it operates.

23. As regards policing of the port area, the conditions under which this is carried out fall within the ambit of Act No. 83-016 of 21 July 1983 and Decree No. 85/1278 of 26 September 1985 establishing the regulations for policing and operations in port areas.

24. In Spain, a bill is being drafted on State ports and merchant marine ports. It provides for the setting-up of port authorities, which are public entities vested with a legal personality, autonomous management and their own budgets. They will be given responsibility for all shipping and land-based operations connected with port traffic, but they may grant concessions for the operation of certain specialized services. The management of the port authorities will be coordinated and supervised by a national agency that will also be responsible for the national planning of investments and will design

accounting and information systems. All the functions of the ports will be managed under private law, in respect of both the operation of facilities and port matters. In Spain, there are currently four autonomous ports with a legal regime fairly similar to the French regime. The management of the other ports falls within the competence of the State.

25. In Portugal, all the commercial ports are autonomous. The ports of Lisbon and Leixoes come under authorities established by Decree Law No. 36/977 of 20 July 1948. These ports enjoy rather broad autonomy vis-à-vis the State, but the State nevertheless exercises financial supervision over the port establishments.

26. In France, Act No. 65-491 of 29 June 1965 established the current regime of autonomy for seaports; on the basis of this Act, decrees were issued, creating six autonomous ports in metropolitan France and one autonomous port in Guadeloupe.

27. General laws and regulations sometimes include a number of provisions concerning ports. One such example is the Merchant Marine Code of Côte d'Ivoire (Act No. 61-349 of 9 November 1961), which defines the regime governing maritime wrecks (including those impeding port operations) and port pilotage.

28. Over and above the enactments of an institutional nature, there are the regulations governing operation of a port. In the port of Abidjan, this instrument takes the form of the Ministerial Decree of 24 May 1963. It refers to the arrangements for the movements of ships, pilotage, port charges, occupancy of wharves, platforms and warehouses, and the hiring of equipment.

29. Further instruments may spell out the general instruments in greater detail. This is the case with Ministerial Decree No. 12 bis of 23 July 1974 containing new organizational regulations relating to the port pilotage station in Abidjan.

30. Many other countries have adopted the statute-law system. Thus in Colombia, Act No. 01.1991 of 10 January 1991 defines the status of seaports. This Act is composed of several chapters. The first contains general provisions, and general principles covering, in particular: port development plan, technical conditions of operation, port associations and definitions. Chapter 2 deals with port concessions, chapter 3 with the pricing system, chapter 4 with obstacles to competition, chapter 5 with the port authorities, chapter 6 with the port operating companies, chapter 7 with port reorganization, chapter 8 with transitional arrangements and chapter 9 contains miscellaneous provisions.

31. It should be noted that this relatively short Act contains all the general principles of the country's new port policy, which represents a radical departure from the previous policy, declares the dissolution of the Empresa Puertos de Colombia, opens the door to privatization, liberalization of charges, subject to the expansion of competition, etc.

(c) Laws and regulations not specific to port activities

32. The reception of vessels and cargo handling operations are the most specific port activities, but ports also have to be familiar with operations in other sectors such as maritime, road or rail transport and Customs operations.

33. The laws and regulations not specific to port activities apply as necessary to the operations which take place within the confines of the port. Such, for example, is the case of the Civil Code in respect of civil liability, the Labour Code, the Code of Civil Procedure in respect of certain disputes relating to operations in ports, etc.

B. Jurisprudence

34. The law is a living subject which must be adapted to unforeseen or new situations.

35. The non-existence of a law or regulation does not mean that there is a legal vacuum. In the event of a dispute, the judge is bound to give a ruling even if the laws or regulations are imprecise or obscure. He must use the general principles of law in this case, which leads him to create the law, not as he pleases, but within the framework of these principles.

36. The rules arrived at by the judge interpret and supplement the laws or regulations and make up what is called "Jurisprudence"; the latter is constituted at all levels of the court system, but the Supreme Court or, in France, the Court of Cassation and the Council of State have the responsibility of unifying the jurisprudence of the courts of first instance (Tribunal d'Instance or Tribunal de Grande Instance) or of second instance (Court of Appeal).

C. Doctrine

37. A secondary source of law, doctrine - in other words, the writings of legal scholars - may influence the drafting of legislation and administrative regulations. Doctrine provides guidance to lawyers with regard to the interpretation of texts and the solution of problems.

II. The sources of international law

38. A number of international conventions apply to the operation of maritime ports. Among them is the Geneva Convention of 9 December 1923 on freedom of access and navigation in maritime ports. The Convention provides: "All ports which are normally frequented by sea-going vessels and used for foreign trade shall be deemed to be maritime ports ...". Every Contracting State undertakes:

> "to grant the vessels of every other contracting State equality of treatment with its own vessels ... as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

"The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries or undertakings of any kind".

39. The Geneva Convention and Statute on the International Regime of Maritime Ports ensures that users are properly informed about port charges and Customs/duties. The principle of equality in the reception of vessels and in the treatment accorded to them at ports of call is referred to several times.

40. Other international conventions having an impact on the operation of ports include:

- The International Convention for the unification of certain rules relating to maritime liens and mortgages, signed in Brussels on 10 April 1926;

- The Convention on Facilitation of International Maritime Traffic, signed in London on 9 April 1965;

- The Convention on Limitation of Liability for Maritime Claims, signed in London on 19 November 1976;

- The Convention on the Liability of Operators of Transport Terminals in International Trade, signed in Vienna on 19 April 1991.

41. Annex II contains a communication received from the International Association of Ports and Harbours (IPAH) which gives further information on the international sources of port law.

III. The nature of port law

42. The relations between members of the port community may be governed by:

Public law;

Private law;

Both private and public law.

A. Relations governed by public law

43. The administrative authorities (The State and local or regional authorities, and public undertakings) are responsible for the organization of society (in other words, for the development of structures and their satisfactory operation).

44. In this context the administrative authorities define the rules of public law governing the operation of ports. To do so, they issue regulations or, as one might say, act unilaterally. The decisions of the administrative authority are not discussed until after they have been issued, when the courts may be called upon to consider complaints that the authorities have acted ultra vires. For example, a government decree or ministerial order laying

down conditions for the use of port facilities applies automatically (in the absence of explicit provisions to the contrary) to all persons concerned.

45. Private law - in other words, the legal regime applicable between two private persons bound by a contract they have entered into - is not normally applicable to the actions of administrative bodies. All representatives of public authorities have the power, within the limits defined by legislation (resulting from the law) or regulations (decrees or orders), to take unilateral administrative decisions. For example, the director of the autonomous port of Abidjan (or a port officer) may order a ship to move for operational reasons (for example, to release a berth and thus permit the loading or unloading of a ship needing to use container lifting gear). This decision is an administrative act which is presumed to be legal and is applied unilaterally. This act is governed by public law.

46. Public law does not apply only to relations between an administrative authority and individuals (natural or legal persons under private law). It also applies to relations between two or more bodies under public law. Thus when the State (in the person of the Minister responsible for seaports) authorizes (or refuses to authorize) works to improve the port, such as the construction of a wharf or dredging of a basin, in a port managed by a public undertaking, the decision taken is subject to public law. As will be seen later, the liability of a person under public law (the State or a public undertaking) is in most cases governed by public law.

B. Relations governed by private law

47. Relationships between the port authority (in other words, the port management) and users (shipowners, consignors, cargo handlers, etc.) are of course governed by port law. In the case of countries like France, port law is principally within the framework of public law. In the countries of West and Central Africa however, these relationships are largely governed by private law.

48. This is also the case in most statute-law countries in so far as the operations of public industrial and commercial services and more generally relations between users are concerned. All the provisions of private law are defined by the Civil Code, the Commercial Code, the Merchant Marine Code (where there is such a code), by laws and regulations and by jurisprudence.

49. If an accident is caused in a port area by equipment owned by a cargo handling company and a docker (or anyone else) is injured, the rules of civil liability defined by the Civil Code will apply. If, however, it is necessary to determine the gravity of the fault of the person causing the accident or of that of the victim, lawyers will take into account the provisions of the police regulations or the regulations for the operation of port installations, if such regulations exist.

50. In another field, if the port authority agrees to ensure the safety of goods stored in the port area, the service provided is industrial and commercial in character, and any loss or damage sustained by the owner of the goods or by an intermediary (forwarding agent, shipper, etc.) must be dealt with in accordance with the provisions of private law (or, if appropriate, civil or commercial law).

C. Relations governed by public and private law

51. A situation may be governed by both public and private law. Let us take the case of the seizure of a ship in a port. The rules of seizure are governed by private law (depending on the country in question, the applicable law may be either civil or maritime law). These rules define the relationships between the debtor whose ship is seized and the creditor on behalf of whom the ship is seized. However, the immobilization of a seized vessel in a port may hamper operations and require a decision by the port authority to order the ship to be moved to another berth. This is an administrative decision governed by public law.

D. Importance of the distinction between legal regimes

52. The distinction between situations governed by public law or private law is of importance in determining the substantive and procedural rules applicable.

53. In the case of a situation governed by public law, the relevant provisions of private law do not apply. Thus in France the Civil Code is not in principle applicable in the case of damage sustained by a ship in port if responsibility for the accident can be attributed to the port authority. The rules regarding jurisdiction depend on the nature of the dispute.

54. In the example mentioned, in Côte d'Ivoire the administrative division (of the Tribunal, Court of Appeal or Supreme Court) would have jurisdiction and would be competent to decide a dispute of this kind. In France, the competent court would be the Administrative Tribunal, Administrative Appeal Court or Council of State, as appropriate.

The common-law system

55. This system grew up in Great Britain. British law is essentially based on case law. However, legislation and regulations are increasingly important in the British legal system. Originally the British system had a dual structure:

Common law, consisting of rules developed by the royal courts (Westminster); and

The rules of equity consisting of the rules developed by the Courts of Chancery; these are equivalent to appeal procedures.

56. In the twentieth century British law has tended to move towards statute law. One of the characteristics of common law is the value attached to precedents, that is to say, to rules whose existence the courts have recognized in cases decided earlier. Only decisions of higher courts constitute precedents with binding force.

A. British constitutional laws

57. Great Britain has never had a formal constitution setting out the principles on which the system of government is based. Great Britain has, however, instruments which take the place of constitutional texts, in

particular the Magna Carta of 1215. The British do not regard the organization of the executive as being governed by the rules of law.

58. The unique feature of British institutions is the concept of the Crown, which differs from the notion of the State in being more personalized and in not involving territorial divisions such as provinces or communes. The Crown is identified with the central power. In principle no injunction can be obtained against the Crown. It is immune from distraint and its property may not be seized. As we will see below, however, the courts have certain important powers vis-à-vis the administrative authorities.

B. The organization of the courts in the United Kingdom

59. The system, particularly with regard to the application of public law, the law directly applicable to ports, is evolving. In brief, the courts in Britain were originally organized around two fields:

Civil matters (e.g. a shipowner's liability vis-à-vis a port authority);

Criminal matters (e.g. an offence against port regulations).

Over the last two decades or so, the rapid development of administrative law has provided a new focus for the organization of the courts.

(a) In civil matters:

60. At the lowest level there are the county courts, which are served by a registrar, who prepares the public hearings and may rule on minor matters. Some civil matters may be heard by the magistrates' courts, which are essentially concerned with criminal matters.

At a higher level is the High Court, which now comprises two divisions:

The Queen's Bench Division, which deals essentially with disputes regarding contracts and damage; and

The Chancery Division, which deals more particularly with matters relating to real estate.

The High Court of Justice is one of the two branches of the Supreme Court of Judicature, the other branch being the Court of Appeal. The court of final appeal is the House of Lords sitting as an appellate tribunal.

(b) In criminal matters:

61. In Great Britain a distinction is made between non-indictable or petty offences, which are tried by magistrates' courts, and more serious offences, known as indictable offences, which are tried at two levels:

The accused appears before a magistrates's court, which decides whether to send the case to trial in a higher court;

If the case is sent to trial, the accused appears before the quarter sessions or the Assize Court of a Judge of the Queen's Bench Division.

62. Any accused person who challenges the Magistrates's Court decision may appeal to the Crown Court. The prosecution may appeal only if the magistrates are believed to have made an error in the application of the law. In such cases, the competent court of appeal is the Queen's Bench Division. An accused person found guilty by a jury may appeal to the Court of Appeal. The prosecution is not allowed to appeal against an acquittal. Once again the House of Lords is the final appeal court.

(c) In administrative matters:

63. The common-law courts have for many years been considered effective guarantors of individual rights. There are in Great Britain a great number of courts specifically established to deal with various administrative disputes, the principle being, according to Professor Bell, that their composition, competence and procedures can be exactly adapted to the needs of the type of case they consider. In regard to their composition, the variety is immense. He adds that a distinction must be made between tribunals which are competent to decide administrative disputes and those which are essentially independent administrative authorities with powers of a largely administrative character.

64. One of the characteristics of British administrative courts is the rapidity of decisions. On the other hand, a procedure not employed in other systems of law is used. Prior authorization is required to introduce a case for prerogative orders against an administrative decision. This procedure is more flexible in Scotland. This prior decision affords an opportunity to consider the case's chances of success.

65. While in France, except when otherwise authorized by the Government, arbitration is prohibited by the Civil Code in the case of disputes involving public authorities and institutions, in Great Britain most disputes regarding administrative conflicts are settled by arbitration.

(d) Administrative law in the United Kingdom:

66. Administrative law is a recent development. Under the common law, relations between the administration and individuals are on the same footing as relationships between citizens. A number of features of British administrative law are survivals of this doctrine and are unknown in the administrative law of the statute-law countries:

- Contracts entered into by the administration may be enforced by forcible recovery;

- Administrative bodies are subject to the same rules concerning the enforcement of judicial decisions as individuals, including execution against movables;

- English and Scottish law attach importance to the uniformity of rules with regard to contractual responsibility and liability for fault;

- The resolution of disputes concerning the liability of administrative authorities is governed by the common law;

- If a petition is filed to quash an administrative decision, the decision is automatically suspended;

- As in civil proceedings, a judge may order local authorities and autonomous administrative bodies to desist from certain actions or to repair omissions. Injunctions may be obtained against them. Orders of this kind may not be made against the Crown.

Conclusion

67. At the methodological level, the first step in applying the rules of law is correct analysis of the issue; one must consider the character of the question to be resolved. For example, in the case of the berthing of a vessel, the first step is to consider the juridical character of the operation. In this case, in most statute-law countries, the issue is one of the exercise of police authority. In the example cited, it is necessary to consider who is competent to exercise the power and to determine its field of application. Two lines of inquiry must be pursued:

- The first relates to the provisions defining persons qualified to exercise police authority;

- The second relates to the provisions defining the content and the limitations of police powers.

68. With regard to substance, if the liability of the port authority is at issue, the outcome is decided by various criteria, depending on the country concerned:

- The legal status of the port authority (public or private);

- The nature of the operation in question and the juridical status of the victim;

- The juridical system (in France, most disputes concerning State liability are within the jurisdiction of the administrative courts, whilst in Britain such disputes are all subject to the jurisdiction of the common-law courts).

CHAPTER II. INSTITUTIONAL ASPECTS: THE LEGAL REGIME OF PORTS

69. Not only do ports serve as compulsory transit points for international goods traffic, but in many cases they also become centres for economic development once processing industries become established in the vicinity of their installations. Seaports give substantial added value to the regional economy. According to a study carried out by the University of Lille III, the port of Dunkirk contributes some 10 billion French francs a year to the economy of the Nord/Pas-de-Calais region. In 1989, traffic through the port of Antwerp (Belgium) generated 188 billion Belgian francs in added value. 2/ It follows from the foregoing that the public authorities are necessarily concerned about the status of seaports, even though their management may be in largely private hands.

70. Generally speaking, there are three types of legal regime for ports:

- Ports under centralized management;
- Autonomous ports under decentralized management; and
- Ports under private management.

In practice, the divisions are not so clear-cut, so that there may be terminals under private management in a centralized or autonomous port.

I. The concept of a seaport

71. The institutional regime of ports depends primarily on how they are defined and the kind of traffic they receive.

What is a port?

72. For Mr. J. Grosdidier de Matons, a port is "a place on the coast specially designated by the competent administrative authority to serve the purposes of seaborne trade". 3/ This definition corresponds to what is understood in the English-speaking world by the term "port", i.e. a territorial unit established on a coastline. But this definition does not take into account the existence of many river ports which, in some cases, handle considerable international traffic although they may be hundreds of miles from the sea (e.g. Asuncion in Paraguay).

73. The term "port" can be used to designate the open roadsteads on the west coast of Africa, where logs are loaded after being floated out from shore, and also indeed the wharves in use along the African coast.

74. In a report prepared for the Commission of the European Communities by the Working Group on Ports, a seaport is defined as: "an area of land and water made up of such improvement works and equipment as to permit, principally, the reception of ships, their loading and unloading, the storage of goods, the receipt and delivery of these goods by inland transport and can also include the activities of businesses linked to sea transport". 4/

75. In some countries the law defines what a port is. For example, article 5, paragraph 11, of the Colombian Status of Seaports Act provides that

a port is: "a group of physical facilities including works, approach channels, installations and services which enable use to be made of an area contiguous to the sea or to a river for the loading and unloading of all types of ships and the transfer of goods between road, sea and/or river traffic. The port terminals, wharves and loading berths are located within the port".

76. Where there is no definition of a port in national law, one has to rely on the international law of the sea. Accordingly, under article 1 of the Geneva Convention of 9 December 1923 on the international regime of maritime ports, "All ports which are normally frequented by sea-going vessels and used for foreign trade shall be deemed to be maritime ports".

77. The legal regime of port management depends on the kind of traffic received by the port. For example, in France, under the Act of 22 July 1983, "The regional authority shall be empowered to establish canals and river ports and to fit out and operate the waterways and river ports transferred to it". The local regional authority is not, however, empowered to operate a seaport.

78. In order, then, to tackle the legal aspects of port management, we need to consider whether what is involved is a port, and in cases where different regimes exist in the country under consideration, whether it is a seaport or a river port. Nowadays, ports are no longer merely places where ships are loaded and unloaded. In order to keep down transport and handling costs, factories are established in the vicinity of harbours, particularly iron and steel works, refineries, petrochemical plants, etc. The establishment of this industrial plant is often encouraged by an advantageous Customs and tax regime (e.g. free zones, enterprise zones, etc.)

79. In addition, the area around port facilities is used as a place to store goods, sometimes for the purposes of speculation (in such cases the length of storage will depend on trends in commodity prices). The port area has become a centre for economic development and a logistics platform for trade.

80. Should this enlarged port area be given a special status? In view of the growing importance of the State's share in port revenue, it has been decided in some countries to entrust the management of the industrial zones alongside port facilities to the port authority.

81. As State property revenue is not linked to the hazards of sea traffic, it provides considerable financial security. In France, one third of the income of the major ports derives from such revenue.

82. In order to promote the development of maritime industrial lands, some countries have adopted provisions regulating the purposes to which such lands are put and not allowing any substantial change in their use except by decree. Furthermore, some are proposing to adopt similar provisions for the possible listing, under a preservation order, of part of the maritime industrial site. To enhance the appeal of such sites, they might conceivably be given the status of a free zone and/or enterprise zone. Once the status of the maritime industrial land has been defined, it is usually advisable to give to a local authority, and often the port authority, the requisite powers to manage it.

II. The legal regime of seaport management

83. The legal regime of port management depends on the degree to which the port is institutionally dependent on the State or a local authority. The regime cannot always be clearly determined simply on the basis of a port's status. For example, in France, an autonomous port is a public State undertaking; in Senegal, the autonomous port of Dakar is a national joint stock company; in Benin the autonomous port of Cotonou is an industrial and commercial public undertaking subject to the rules of private-law companies.

84. The legal regime of a port depends primarily on the will of the State, which either, adopting a macroeconomic (or global) approach, sees to it that the port system makes the best possible contribution to the country's development, or, adopting a microeconomic (or local) approach, regards the port as an economic entity which should operate by its own means and whose purpose should be to ensure the lowest possible transit cost for goods.

85. A Government's economic and political strategy is then usually enshrined in instruments, which take the form of laws where principles are concerned and regulations for the purposes of implementation. Constitutional systems, where they exist, designate the authorities empowered to adopt such instruments. The rules generally vary according to whether the State is a unitary, federal or confederal State, and having regard to the degree of decentralization and especially to the legal systems in force in the country concerned.

86. The content of the instruments varies from one State to another. In one State a law may clearly determine the status of ports, whereas in a neighbouring State it will do no more than set out general principles and refer to the rules specific to the type of legal structure involved. In France, for example, the Seaports Code contains provisions specific to autonomous ports - which are public State undertakings - but refers, for their accounting system, to instruments concerning industrial and commercial public undertakings to which an accounting officer has been assigned, regardless of the activity of those undertakings.

87. The form and content of the instrument may vary according to the size of the country and, in particular, the number of its ports. In States such as the United Kingdom, the People's Republic of China, Morocco and France, which have many ports, there are one or more laws or one or more decrees (according to the Constitution) establishing the legal framework of ports, and decrees or orders (or equivalent acts) which specify the regime of each port or category of port. In States where there are only one or two large ports and a few small ports (e.g. the countries of West Africa), a legislative enactment usually exists that lays down in fairly precise terms the regime governing large ports.

What should be included in instruments concerning the legal regime of ports?

88. First, they should be in line with the constitutional principles in force in the country concerned, where appropriate, and with international treaties and conventions. A word of advice is in order here. Besides being clear, the instrument should contain short articles, as a long text is a source of ambiguity.

89. So far as possible care should be taken not to break new ground by establishing a regime sui generis, i.e. which constitutes a category of its own. For it to be possible, when interpreting texts, to invoke the principles governing a particular type of structure, only existing legal regimes should be applied, such as those governing public undertakings, local authorities (for decentralized ports), commercial companies, etc.

90. The text should clearly indicate whether the port is managed by an industrial and commercial public undertaking, an administrative public undertaking, a limited company, etc. Even when, as in Zaire or in other countries like the People's Republic of the Congo, the management of ports is integrated into a structure covering all means of communication, a specific enactment for ports is necessary in order to take into account the special nature of the facilities involved.

91. It is desirable for the instruments relating to seaports to be codified as this has the effect of bringing them together. This may take the form of a specific code for ports, but also conceivably, as is the case in some African countries, of a merchant shipping code containing all the instruments concerning ports, maritime transport and even the marine environment.

92. In addition to the legal status of ports, it is desirable to include in this text the main points regarding what is necessary to ensure their effective operation and development without excessive legislation, as this would mean introducing constraints which may subsequently become obstacles that it will be difficult to disregard when they have force of law. Clauses may, however, be included on:

- The powers of the port authority;
- In some cases, the composition of the governing board;
- In the case of a commercial company, the conditions governing the subscription or transfer of shares;
- Accounting and financial rules, when it may be useful to bring them into line with commercial standards;
- Methods of financing improvement operations and equipment when they are not entirely self-financing;
- The ways in which supervisory power may be exercised, where it exists and when this can help to ensure that it does not impede the efficient conduct of everyday or development operations;
- The regime for the management of public installations or facilities, when they exist (e.g. management under State control concession, lease, etc.);
- The basic rules concerning the special port police (operation and preservation of port areas under public ownership) and those concerning security, pollution, environment and dangerous substances;

- In some but not all cases, the regime for the organization of port work (i.e. conditions of employment of stevedores), when this facilitates subsequent developments in line with traffic requirements;

- The rules relating to State property management.

93. As the legal regime of ports is established at the national level, it is desirable to supplement it by provisions of local scope to take into account the specific features of each port (e.g. port operating rules).

A. Ports under centralized management

94. Whatever the country, the State (parliament or the administrative authority) defines the legal regime of ports and, consequently, the extent of the port authority's dependence on it.

95. Regardless of what it is called, a port under centralized management is distinguishable by the fact that, legally, any important decision concerning the operation or development of the port has to be taken by the central authority. In practice, this category includes so-called autonomous ports, which are in fact subject to such close supervision that they may be likened to ports under centralized management.

96. This category also includes municipal ports, ports held to be "in the national interest", national port offices or port administrations. What they have in common is that they are required to obtain the authorization of the central authority (national or regional) for any important decision concerning purchases, recruitment, tariffs, investments, etc. When, in addition, these checks are made on an "a priori" basis (and not "a posteriori"), they create bottlenecks in the port and prevent it from adapting to the requirements of trade. It will be noted that there is sometimes a contradiction between the official status of such ports, whereby they are given the powers required for decentralized management, and the practical means available for the implementation of the instruments in question, which make them ineffectual.

97. There are, however, ports under centralized management which operate effectively when there is little distance between the port and the central authority (municipal or regional ports) and when the provisions for monitoring are flexible. In ports under centralized management, it is desirable for there to be collaboration with private enterprises, which act as concessionaires for public installations or as suppliers of port handling services.

98. The concept of public value, or in other words the satisfaction of collective public needs, finds a broad application in the management of such ports and is far from being incompatible with attempts to secure a good return from investments. In terms of personnel, these ports are sometimes managed by civil servants and consequently suffer to some extent from the constraints of civil service regulations, especially where recruitment is concerned. In Europe, most of the ports in the south are under centralized management, as they also are in Africa and in many developing countries elsewhere.

B. Ports under decentralized management and autonomous ports

99. Decentralization consists in the transfer of some of the State's powers to local authorities. In the case of an autonomous port authority, what is involved is the sharing of power between the State, economic decision-makers and local government representatives, by virtue of an administrative structure under State supervision. Both the decentralized port authority and the autonomous port authority operate the facilities of which they have been granted the use and are responsible for port policing.

(a) Decentralization with regard to ports

100. The decentralization of responsibilities is to be understood with reference to a central authority, which assumes varies guises, according to whether the State concerned is a unitary State, a federal State or a confederal State.

101. In the United States of America, the Supreme Court has ruled that the port area covered by navigable waters is common property entrusted to the care of the federal State. In the countries of northern Europe, port decentralization is a reality and goes back to very early times. The management of most of the Hanseatic and Scandinavian commercial ports is in the hands of the municipal authorities. In France, until 31 December 1983, all ports came under the responsibility of the State. As from 1 January 1984, a further category of ports was established, the regime of "decentralized" ports, which are developed and operated by the local authorities.

102. As trading ports are usually seen as centres for economic development, they cannot afford to suffer any time-lags in their management because of the functioning of an over-centralized administrative structure. The local authorities are in the best position to assess the importance of a project and how urgently it needs to be carried out.

103. Decentralization undeniably facilitates more rapid decision-making. What is more, the local authorities have a natural inclination to structure the port community which is essential to the development of the port. When entrusted with port management, these local authorities also have the means of determining the acceptable level of taxation for port users, so far as local taxes are concerned.

104. The limits to decentralization are often seen when financing has to be found for major infrastructure work. In some cases it proves essential here to obtain assistance from the State. This solution is sometimes adopted so as not to make users bear the cost of work unrelated to the volume of traffic (e.g. building a dock, making a new channel).

(b) The regime of the autonomous seaport authority

105. Legally speaking, the regime of the autonomous port authority does not rule out all links with the State, for this is a mode of management which recognizes the legal personality and the financial autonomy of the port authority with the object, in particular, of circumventing the budgetary rules of the State, which usually oversees and inspects the accounts of the undertakings concerned.

106. Not all countries subscribe to such principles and some consider supervision to be incompatible with autonomy. In fact, ports may enjoy autonomy under different legal regimes: as public State undertakings, as mixed public undertakings (in France) as private-law entities (in Benin) or as national corporations (in Senegal).

107. In some cases, a port may be managed by way of structure covering all inland public transport and enjoying relative autonomy, like the port of Pointe Noire in the People's Republic of the Congo, which is administered by the Agence Transcongolaise des Communications, a "State-controlled pilot undertaking" since Act no. 54/83 of 6 July 1983.

108. The operation of most of the ports in a particular country is sometimes placed in the hands of a single industrial and commercial public undertaking, as in the case of the Office d'Exploitation des Ports du Maroc, established under Act. No. 6-84, which is endowed with legal personality and financial autonomy. In Morocco, the State nevertheless retains responsibility for, in particular, the planning, building and maintenance of port installations, along with other prerogatives in respect, for instance, of port police, security, etc. In Europe, some ports, although decentralized in relation to the State, are administered by local authorities, as in the case of the ports of Antwerp, Rotterdam and Hamburg.

109. In France autonomous maritime ports are subject to the regime laid down by Act No.65-491 of 29 June 1965. They are public undertakings. According to the Council of State, they are mixed public undertakings, in other words they simultaneously engage in administrative activities (policing, development, etc.) and industrial and commercial activities (operation of equipment); for the Court of Cassation, they are industrial and commercial public undertakings that can exercise certain administrative activities. They are subject to the supervision and financial control of the State.

110. The autonomous port authority is administered by a governing board composed of economic operators, local elective office-holders and representatives of the State, the personnel and the dock workers.

111. The government commissioner has the power to veto the deliberations of the governing board if he considers them illegal or not in conformity with the Government's port policy, which shows the limits of this autonomy.

112. The reason for the adoption of this regime was that the legislature found that there was a need to make the rules governing the management of the major French ports more flexible and to enable them to benefit from a substantial share of the budget provision for port and harbour operations.

113. The law laid down, according to the nature of the infrastructure work to be carried out, a maximum rate of State assistance to autonomous ports. However, the amount of the assistance is determined by the appropriations voted under the Finance Act.

114. The personnel of the autonomous ports are subject to the rules of ordinary law; in other words, staff management is not hampered by the constraints of the civil service regulations, and the high salaries they receive, as compared with public officials, attract dynamic and efficient

managerial staff. The French Civil Code prohibits public undertakings from compromising or submitting a matter to arbitration, such prescriptions limit the powers of autonomous ports in commercial negotiations with users, as do the rules of public accounting.

C. The legal aspects of the privatization of port operations

115. The concept of "privatization" with regard to ports is not a new one. In bygone centuries, economically powerful countries have had private ports (e.g. Great Britain, United States). Port privatization may take various forms: the State may grant the private sector a concession for all port operations or, in some cases, undertakings may be authorized to construct and operate private terminals. The public administration of ports developed following the accession of numerous countries to independence in the early 1960s; the Governments of those countries wanted to exercise control over port operations, which are of significant strategic interest for foreign trade.

116. A new worldwide trend towards privatization of ports began in about 1980. Thus the operation of specialized terminals, particularly for containers, was rapidly privatized in certain countries, such as Malaysia and Jamaica. Other countries went further and privatized a substantial number of ports. Thus, in 1983 and 1984, the United Kingdom privatized Associated British Ports, which owns 21 ports accounting for more than a quarter of national port traffic. Other regions, such as Latin America, western and eastern Europe, and Asia, have also been affected by the trend towards privatization. The acknowledged flexibility of management in the private sector constitutes an unquestionable asset for the efficient operation of port activities.

117. In most countries, the privatization of ports is decided or authorized by law. Since July 1991 in the United Kingdom, the law has offered the "trust ports" the possibility of going private. This operation takes place on an ad hoc basis in accordance with the open invitation to tender procedure. In the case of ports whose annual turnover is in excess of £5 million (i.e. 14 ports at the present time), the Minister of Transport has the right to take the initiative in privatization within a period of two years.

118. In Colombia, Act No. 01 of 10 January 1991 relating to the status of maritime ports, recalling that "The establishment, maintenance and continuous and efficient operation of ports are in the public interest", recognizes that "The public entities, like private undertakings, may establish port companies for the construction, maintenance and management of terminals or wharves and provide all port services". This amounts to a kind of free-choice privatization. Article 5 of the Act defines port companies as "limited-liability companies formed with private, public or mixed capital, whose social purpose is to invest in the construction, maintenance and management of ports. They may also provide services - loading, unloading, storage in ports and other operations directly related to port activity".

119. Among the various categories of Colombian ports there are, according to the Act, "private service ports", in which services are provided only to undertakings legally or economically related to the port company which owns the infrastructure. "Private" ports belong to a port undertaking, in which persons in private law hold a majority share of the capital.

120. In the case of the private management of a terminal, it is often the contractual solution which is adopted; in other words, the port authority grants a concession for the construction and operation of facilities and the use of a port area to a private-law company. In order to interest private investors, substantial length of the concession and recognition of actual rights over facilities constitute essential guarantees.

121. For the purposes of the operation of ports, free competition between private port undertakings is probably more effective than close supervision by the administrative authorities. The regulations on privatization must recognize the principle of freedom of charging for port services in order to create commercial dynamism. The corollary of this freedom is the application of the ordinary-law tax regime since, in the area of privatization, port activities are deemed to be ordinary commercial activities. In most cases, the administrator of a private port does not have police authority, although he often has a port security service.

122. Lastly, it should be noted that there is no specific legal status for companies which own or manage ports. It is in principle the regime of the limited-liability company which is adopted, and the public bodies may, where appropriate, subscribe capital to such a company. Each country has its specific characteristics, and port management models existing in other countries may be used only subject to substantial adaptation; the privatization of port activities is consistent with market-economy principles, although limits must be set in order to avoid reversion to a monopoly situation prejudicial to the interests of the community.

CHAPTER III

THE LEGAL REGIME GOVERNING THE DEVELOPMENT AND FINANCING OF PORT WORKS AND INSTALLATIONS

123. It is important for any Government to examine the question whether or not port investments should be made subject to the general principles law. Recourse to a dispensatory regime is conceivable since it sometimes offers particularly favourable tax conditions for ports (e.g. regime of free ports or shops, enterprise zones, total or partial tax exemptions).

I. Port facilities

124. There are two possible cases:

The creation of a port; or

The extension of existing port structures.

Port facilities require studies of various types:

Technical studies: nature of the soil, currents, bathymetry, access roads, railways, waterways, etc.;

Economic and commercial studies: project feasibility study (comparison of economic and financial cost and benefit flows);

Legal studies: study of requirements imposed by legislation (necessary authorizations, preliminary procedures) and compliance with these requirements;

Other studies: study of impact on level of employment and the environment.

125. These studies must be carried out in parallel because if a project proves economically feasible, it is only after the technical study and the legal and other constraints have been taken into account that it can be executed.

126. If the technical or economic study was carried out without a knowledge of the relevant legal provisions, the promoters would undoubtedly meet with a disappointment in the course of execution of the project (e.g. longer time-lag due to the execution of certain procedures or, pending authorization, prohibition of certain works in protected sites).

127. As soon as the project outline has been completed, two questions must be considered:

In accordance with what rules of law can the project be carried out?

What will be the regime for the management of installations?

The method of financing the work can be considered, where necessary, in the light of the reply to the second question.

A. The legal study prior to the execution of development work

128. Even in the absence of procedural constraints prior to construction of a facility, its method of financing must be considered. If the port authority does not have the necessary funds for this purpose, it will have to seek assistance either from other public entities or from private partners. This means entering the realm of contracts. In any event, unless the work is carried out under State control, contracts will have to be concluded for the studies and/or for actual construction work.

129. Let us take the example of the construction of a container terminal. What are the legal questions that have to be examined? First of all, are there any particular requirements for construction on the site? In France, for example, depending on the cost of the work, a joint inquiry, as provided for under the Act of 29 November 1952, may be obligatory. The purpose of this procedure is to ensure that the planned work does not jeopardize the interests of national defence in particular. If this is not the case, and if there is conflict between two public interests, arbitration may take place, under the auspices of the Prime Minister, between the Minister of National Defence and the Minister responsible for seaports (or any other Minister concerned).

130. Among the other interests which may enter into conflict with the construction of a port facility, there is environmental protection and the interests of third parties. In many countries (e.g. United States), port plans have to be approved by environmental protection agencies.

131. The construction and operation of a wharf may disturb the marine environment or jeopardize fishing interests. Thus the building of a port in an African country modified the currents and coastal transit to such an extent that the flow between the lagoon and the sea was impaired, and this has had adverse consequences for fisheries. Consideration must be given to the economic consequences of such a situation and to the necessary remedial measures. Already at this level of planning, the concept of liability comes into play.

132. If the proposed facility is a large one, its existence will probably modify nautical conditions, and in this case the project will have to be submitted for an opinion (or possibly approval, if this is provided for by law) to the maritime authorities, either civilian or military. A maritime signalling plan will have to be drawn up on the basis of the rules imposed by domestic law (law of the country) or international law. The signals will have to comply with the prescribed norms, as safety at sea will depend on this.

133. In principle, a port facility is not designed in isolation. To revert to the example of a container terminal, this will comprise, in addition to a wharf of sufficient size to handle the ships, one or more gantry cranes and a storage area. The latter may be constructed on land belonging to the port authority or, failing that, the authority will have to acquire the land by mutual agreement or through expropriation. In the latter case, land ownership constitutes a prerequisite for construction of the terminal, because a wharf and cranes cannot be left unused pending acquisition of land for the construction of the storage area and access roads in the vicinity of the installations.

134. Apart from the problems of land, conditions of access to the terminal by road must be taken into consideration. It is necessary to establish not only whether the road network is capable of absorbing the resultant traffic, but also whether there are any particular legal constraints (e.g. limitation of the weight of loads), and whether the route determined in the light of highway regulations is suitable for the expected traffic (bearing in mind limitations on the height of vehicles, for example). There may be general prohibitions applicable to the whole of the territory of a State (e.g. lorries over 10 tons forbidden to enter built-up areas) which jeopardize access to the terminal. In this case, two solutions may be envisaged:

An amendment to the regulations in order to remove the ban or to create an exception to it, but in this case it will often be necessary to implement a cumbersome and lengthy procedure (e.g. public inquiry, consultation of various authorities, adoption of regulations at the governmental level - decree or even parliamentary legislation); or

Acquisition of ownership of the land needed and construction of roads designed specifically for access to the terminal.

Apart from a possible expropriation procedure, consideration must be given to the cost of financing the work.

135. One of the essential criteria for a port's competitiveness lies in the cost of transit of goods. In order to promote the optimum use of installations as soon as they are brought into operation, consideration may be given to the formulation of the technical plan and an attractive Customs or tax regime (e.g. creation of a free port or free zone regime). In addition, a study should be made of the provisions of labour law in order to organize the building site and to predict as precisely as possible the time-frame for the entry of the facilities into operation.

136. To sum up, the construction of a port facility entails not only a knowledge of specific regulations relating to a facility of that nature, but also a sound understanding of ordinary law (i.e. law not specific to port matters): labour law, civil law, tax law, Customs law, transport law, etc. In France, the Seaports Code contains most of the procedural regulations relating to port works, but a number of provisions remain uncodified or are integrated in other codes (town planning, mining, State property, etc.).

B. The implementation of inquiry procedures

137. Although in practice the time-scale is not always adhered to, in law it is necessary to comply with all procedures before work commences. Early commencement of work may constitute an irregularity liable to affect the legality of the necessary administrative authorizations. If the latter are refused, however, the suspension of work will entail a considerable loss for the contractor. In addition, the procedures must be coordinated. If, for example, an impact study (of the planned facility) on the environment is required, it will have to be carried out prior to the public inquiry or the administrative inquiry. The impact study must be incorporated in the inquiry dossier; the persons or authorities consulted must give their opinions with full knowledge of all relevant material.

138. Similarly, before a concession is granted for the construction and operation of a facility or equipment, a prior inquiry is necessary. Its purpose is to ascertain the opinions of the competent persons concerning the scheme in order to pinpoint sufficiently early the disadvantages which the operation might entail and enable the studies to be revised (if necessary).

139. If, in the light of the results of the inquiry, substantial modifications are made to the initial project, calling its economic basis into question, a further inquiry has to be carried out, as in the situation where legal or de facto changes take place between the time of the inquiry and the decision to approve the operation.

140. The authority which decides to authorize execution of the project must possess reliable information in order to reach a decision with full knowledge of the facts; for example, it may not base its decision largely on the results of an inquiry carried out several months, if not years, beforehand (the context in which the project was designed may have changed). This is not a matter of legal "quibbling" (to use a pejorative expression relating to procedures and provisions whose value is not perceived), but by means of the administrative examination of a dossier errors prejudicial to the port community must be eliminated.

141. In the context of a public or administrative inquiry, it may be learnt, for example, that the armed forces intend to carry out a project on the site proposed for the construction of a timber or container terminal, or that the construction of a wharf will cause erosion in a sensitive area, or that dredging work for the construction of a channel will disrupt a fisheries zone and thus endanger an activity of some importance for the local economy.

142. In many cases the conditions in which inquiries are to be held are defined in regulations: composition of the dossier, duration of the inquiry, publicity (in the press, in the town hall, individual notification), but this is not always the case. Except in an emergency, the public or administrative inquiry must take place over a minimum period of three weeks to one month. The persons consulted must have sufficient time to give a fully substantiated reply.

143. Consultation of the public must take place in an easily accessible place (a town hall, for example), and when the project concerns several towns or villages, provision must be made for several consultation points. The administrative authorities are informed by mail or express their views at public meetings organized for this purpose by the department conducting the inquiry. The period of the year when the inquiry is to take place must be selected in such a way as to ensure that the persons concerned by the project are able to express their views (holiday periods or periods of seasonal work, for example, are to be avoided).

What is the significance of the public inquiry?

144. A negative opinion must not be viewed as tantamount to a veto. It is apparent from experience that it is essentially the opponents of a development project who express their discontent. Thus, in France, the State Council (which is the supreme administrative jurisdiction) takes the view that the

commissioner conducting the inquiry may lawfully express a favourable opinion even though only unfavourable opinions originating from the public have been expressed in the course of the inquiry.

145. Generally speaking, the authority competent to authorize execution of port works is not bound by the opinion expressed by the commissioner. It may, for example, override an unfavourable opinion; however, it will do so with full knowledge of the facts. Through his opinion, the commissioner must provide sufficient information to the tribunal in the event of a dispute concerning the justification or otherwise of the decision taken by the administrative authority. To sum up, the time spent, at the administrative level, on the inquiry into a port work project must not be regarded as time wasted.

146. An efficiently conducted inquiry must enable the maximum number of risks to be eliminated. Thus, for example, in the course of the inquiry into a project, departments may make observations of a technical nature, drawing the attention of the contractor to certain aspects of which he was unaware (geological and seismic situation of the region, meteorological regime, problems of road or river access to the work site, etc.). The results of the inquiry must above all be used for technical and economic purposes. The law is involved only for the purpose of organizing the consultation and, when necessary, safeguarding the financial interests of the public body concerned.

II. The financing of port works or equipment

147. Financing conditions for port works and equipment are generally dependent on the legal status of the port; in centrally-managed ports, however, private investments may be made (e.g. construction of warehouses).

A. The financing of works according to the port's legal regime

148. In some countries the law on commercial ports lays down the conditions in which infrastructure work may be wholly or partly financed by the State. This is the case in France with the Act of 29 June 1965 relating to the autonomy of ports. It should be noted that what is involved is merely the setting of limits on a possible commitment, confirmation of which is effected by the voting of appropriations under the Finances Act. Of course, if the State gives up financing a project, the autonomous port can take over that responsibility, either alone or with partners.

149. On the occasion of the introduction of decentralization, the Act instituted a general decentralization grant in the following terms:

> "The appropriations from the State budget previously voted for investments effected or subsidized by the State in respect of commercial or fishing ports shall receive special support within the general decentralization grant. They shall be distributed ... among the departments carrying out investment work or participating in their financing, on the basis of the areas of competence transferred to them ...".

The assistance of the State is proportionate to the works undertaken, in the light of the cost of projects proposed in other departmental ports.

B. The financing of port works according to their nature

150. In many countries, the State has traditionally assumed full or partial responsibility for financing investments in port infrastructure, while the port authority has decided how those investments were to be used. However, this rule does not apply in every country, since in some countries ports are financed from the income (or loans) generated by port activities, without any subsidy from the State. The present trend is towards relinquishment of State responsibility, involvement of operators and high participation by the private sector, especially for the construction and operation (equipment) of land installations. In France, there has been a significant reduction in State investment in seaports, from 2,235 million francs in 1975 to 307 million francs in 1989.

151. The port authority often has recourse to concessions for the construction and operation of facilities. In such cases, the concession-holder finances the operation alone or with grants from public bodies, but in France the works for which concessions have been granted belong to the concession-granter. The authority may also make land available to a private investor, on condition that he uses it for the establishment of private plant which is required to be of public value. In Antwerp, 90 per cent of the plant is private. Public works concessions, like private works authorizations subject to the condition of public value, may be granted to commercial companies, communities of interests and semi-public companies.

152. In some ports and in some countries like France, the concession system does not allow the possibility of concluding leasing contracts or taking out mortgage loans since the facilities concerned are under public ownership, whereas such methods of financing can be used for works under private ownership in maritime industrial lands. This has not always been the case. Some countries take the view that only the land is public and that the buildings erected can be mortgaged (Côte d'Ivoire, Spain). In Antwerp the leasing of property is possible on land within the port area: the investor is the owner of the works which he installs. A distinction is increasingly drawn between the concession of land and the concession of services, which is a more modern and more useful concept. Use of the latter type of concession is recommended by the European Economic Community.

153. In the port of Rotterdam the concession system applies to the renting of land. On the other hand, the system existing in Spain allows the concession-holder to enter into mortgages. The concession is granted for a particular operation.

154. In France, private works subject to the condition of public value may be financed under hire-purchase arrangements even if they are used within the area under public ownership, provided they cannot be categorized as real estate.

155. Leasing has developed considerably since the Second World War and the emergence of specialized companies. These companies play a role comparable to that of banks. However, instead of granting loans to their customers, they purchase, for example, port facilities and then lease them out. The advantages are as follows:

- Flexibility of the terms of the contract, particularly attractive to those who are unable or unwilling to buy on credit;

- Small cash payment. As the leasing company is the owner of the equipment, it does not necessarily have to ask for a high percentage of payment in cash, as is often the case with other methods of financing. In addition, it is possible to finance in this way the total cost of the equipment;

- Leasing does not exclude the possibility of credit;

- In some countries the leasing company enjoys tax advantages which help to lower the cost of the operation. The lessee may also enjoy tax advantages in the form of a deduction from taxable income;

- Leasing makes it possible to guard against the drawbacks of obsolescence, which is particularly marked in the case of some port facilities.

156. It is to be noted that a convention on International Financial Leasing was prepared in 1988 under the auspices of UNIDROIT. The purpose of the convention is to remove certain legal obstacles and to establish an equitable balance between the various parties concerned.

C. The main sources of financing for port works

157. There are three main sources for the financing of port works:

- Public financing;

- Private financing;

- Mixed financing (public and private).

(a) Public financing

158. Although there is a tendency for the State to relinquish responsibility for the financing of ports, all or a large part of port operations, particularly infrastructure work, are often still financed from the State budget. However, other public bodies also contribute financially to such operations (e.g. municipalities, regions, federal States).

159. In the United States, the public financing of port facilities amounted to more than US$ 4 billion from 1979 to 1981 (not counting private financing). The sources of this financing were: 47.7 per cent, port income; 14.8 per cent, general bonds issued by States or local government; 27 per cent, bonds guaranteed by income from the port or project to be financed; 2.7 per cent, loans; 2.5 per cent, miscellaneous donations; and 7.6 per cent, other sources.

160. Public financing is the result either of a legal obligation or of a voluntary contribution in support of an activity of general interest. According to the legal provisions or economic strategy applied, financing can be on a regular basis i.e. annual payments, or occasional, with public sector

contributions only in the event of need. When the State's contribution covers only part of the financing of the work and its own resources are inadequate, the port authority often has to have recourse to loans, particularly on the international market.

161. Admittedly, the State gives its guarantee, sometimes against payment, but the port authority finds itself faced in some countries (e.g. Cameroon) with a two-fold problem:

- Lack of long-term reliability of income forecasts owing to the uncertainties inherent in the economic crisis which hits the developing countries harder;

- Increase in the cost of annual repayments of loans as a result of unfavourable trends in exchange rates.

162. International assistance is a form of public financing; port-related projects are sometimes carried out by this means. Such assistance may come from one or more countries or from international institutions (e.g. World Bank, European Economic Community). Public-sector assistance is sometimes indirect, as in the case of tax reductions or exemptions.

(b) Private financing

163. There are various means whereby private investors may be involved in the development and operation of ports. Such is particularly the case through the establishment of commercial companies for the purchase and operation of handling equipment, or for the construction and management of terminals (Hong Kong, United Kingdom, etc.). Other options exist, for example communities of interests or associations. Port investment operations are sometimes conducted by means of loans, hire purchase arrangements, back-up funds, etc. It should be stressed finally that, in practice, port operations are frequently financed under mixed-economy arrangements. Seaport management is ensured through a combination of public and private capital.

(c) Mixed financing (public and private)

164. This is being increasingly developed in many countries, a case in point being, in France, the establishment of the fast port at Le Havre, financed by the State, the regional council, the autonomous port authority and operators. Funds are mustered from the various public sources available: the State, the region, the municipality, supplemented if need be by private financing, usually provided by operators, entailing special financial and sometimes legal arrangements.

165. Financial participation by public bodies may take the form of subsidies, in which case a project for work or the acquisition of equipment is submitted to those bodies by the port authority. Once an agreement has been reached, funds are paid against evidence of expenditure or in accordance with a protocol defining the nature, scale, cost, duration and purpose of the work and the functions to be served by it.

166. When a private legal entity (e.g. commercial or non-commercial company, community of interests, association) participates in the financing of port

operations, this may be due to an interest in the projected work. In such cases, an offer of support may be made, in other words, a unilateral administrative contract whereby the party making the offer undertakes to pay a contribution by a particular time and in a specified form. This contract is concluded irrespective of the financial contributions by public bodies.

167. The public and private partners involved in the financing of port operations may be brought into association for the purposes of work for which a private enterprise has been granted a concession. In such cases, the public bodies grant subsidies or loans at reduced rates or free of interest. The contribution made by such bodies is sometimes indirect, for example in the case of temporary tax exemptions.

CHAPTER IV. PORT POLICING

168. The idea of "policing" often brings to mind punishment, but in fact it corresponds to the last phase in the process of the organization and coordination of port activities involving all port activities on sea (movement of ships) and on land (storage of goods, etc.), including conditions of access to the port. Depending on the country, the requirements are contained in police regulations, rules of operation, a code (seaports code or merchant marine code) or the decisions of the port authorities or local administrative authorities; in some cases, they may be contained in more than one instrument at a time. The duty of the police is to delimit the boundaries of permitted activities and to ensure that the boundaries are respected.

169. However, the idea of policing does not mean the same thing in all countries. In the United Kingdom and many other countries, the Government exercises police authority, primarily in order to prevent crime. There is no port or administrative and environmental police. In other countries, such as Spain, Morocco and the Netherlands, there are two and even three different types of port policing:

(a) General policing by the security forces, gendarmerie or others whose function is to protect persons and property against possible wrongdoers;

(b) Special policing or special administrative policing by port staff either on water (port officers) or on land (port officers, guards, or gendarmes) to ensure the smooth operation of the port and, in particular, the implementation of the relevant rules and administrative instructions. In Côte d'Ivoire, such special policing is performed by port gendarmes and port officers. In Antwerp and Rotterdam, the port director's office ensures the implementation of regulations and the prevention of offences that might hamper the smooth functioning of the port or endanger persons and property. The personnel responsible for such policing are usually on oath and may take certain measures when an offence has been committed.

(c) Investigative policing, whose purpose is to gather evidence to determine whether an offence has been committed and bring the offender to trial before a court.

170. Although policing is a type of action, on an everyday basis, it brings to mind the personnel responsible for such action. It is a public service performed in the general interest.

I. The value of policing in ports

171. It is obvious that the different types of port policing affect port operations and that, when they are effective, they help ensure the port's efficient functioning and the protection of port installations and facilities. Disorder is a cause of waste and insecurity that will hamper the effectiveness of any economic activities affected by it. Such activities have to be organized and protected, and measures have to be taken for this purpose.

172. The following example illustrates the economic role of administrative port policing:

A ship's cargo is unloaded at an open storage yard near a specialized wharf and is to be removed within three days. For various reasons, however, the owner collects the cargo only one month after the scheduled date. During this time, two ships which were supposed to use the specialized wharf were unable to put in at the port because the storage yard was occupied.

173. Even if a high percentage is used in setting the fee for the period beyond the originally authorized storage time, such a solution will not compensate for the losses actually incurred by the port community:

Loss of port charges for the two ships;

Loss for stevedores of earnings on two cargoes;

Loss of earnings for various port operators (pilots, tugboat company, consignees, forwarding agents);

Increased cost of supplying undertakings which have had to route the imported goods through a port farther away from their production centre;

A tarnished image for the port if such a situation occurs again; one likely consequence is that the port will be classified by the maritime conferences as unreliable and this would have the trickle-down effect of subjecting the shipping of goods to this port to a penalty surcharge.

This situation does not take account of the exercise of administrative police powers.

174. When such powers are exercised after a warning has been sent to the owner of the goods to have them removed by the time the deadline expires, the competent authority (port director, port officer or harbour-master, depending on the country concerned) orders the removal of the goods at the owner's expense and risk, if necessary by requisitioning persons capable of carrying out the operation. The owner of the goods may also be liable to criminal proceedings for obstructing the operation of a public service.

175. This example shows that the exercise of administrative police functions may lead to proceedings in criminal or administrative courts, depending on the legal system in force in the country concerned. In the remainder of this study, we shall refer primarily to the port's special administrative police.

II. Exercise of the various categories of police authority

176. In the countries where it exists, the seaport police constitutes a special administrative police force which may take two types of action:

Specific decisions: authorizations, prohibitions or orders;

Coercion: use of physical means to halt a disturbance or a prohibited activity.

177. The general police authority also has regulatory power, but a special administrative police authority may have such power as well. In the Netherlands, for example, the harbour-master issues crime prevention instructions and regulations.

178. Several different types of police may be concerned by the same activity. For example, the pollution of port waters may involve the conservation police, the maritime fisheries police, the environment police and the public security police. In such a case, police jurisdiction overlaps. Not only may the general police overlap with the special police, but two or more special police forces may also overlap. Specifically, two authorities may intervene to prevent certain types of situation; there is usually no conflict. When regulations issued by the general police authority are not enough to prevent a disturbance that may affect an activity which is also protected by a special police authority, it may adopt more restrictive provisions to safeguard the interests for which it is responsible, but the opposite is not possible, since the special police cannot adopt regulations that are less strict than those issued by the general police. The provisions defining the exercise of general police powers are different from those relating to the exercise of special police powers.

179. There are limits to police authority:

It must be exercised in the interest for which it was established;

All police authorities are subject to the limits set by law and by the general principles of law; in any event, their only purpose is to safeguard the general welfare;

In order to protect the normal exercise of freedoms, the courts are often suspicious of measures embodying general and absolute prohibitions;

The exercise of special police authority is subject to court supervision.

III. The functions of the special police in seaports

180. A port is a built-up area intended for the admission of goods carried by ships. It is also an area where large numbers of people work. In those countries where there is a special port police force, the organization of the port area is generally ensured through regulations (decrees or orders) containing provisions applicable to all. These instruments impose both obligations (e.g. the obligation to request authorization for a ship to enter port) and prohibitions (e.g. no fires to be lit and no smoking in the vicinity of an oil landing-stage). In many cases, however, the regulations establish the obligation to comply with the orders of port authority personnel (in particular, port officers). The special port police ensure the smooth operation of a public service and the protection of installations and facilities.

181. Even in countries where the concept of public service is not highly developed, police measures are necessary for the efficient operation of ports. They must be decided on in close liaison with senior port officials in order to ensure the smooth conduct of operations. Any act liable to disrupt the efficient operation of port installations does not automatically come within

the purview of the special port police. The theft of goods, for example, comes under general principles of law, but in Côte d'Ivoire, in the case of theft from a wreck, article 35 of the Merchant Marine Code contains a specific provision concerning reporting of the offence.

182. In countries with many ports, there may be general requirements at the national level concerning the cleanliness of equipment, safety instructions to be followed in the event of an accident, traffic and the parking of vehicles, the allocation of berths, etc. These requirements are supplemented by other requirements specific to each port contained in special regulations and in regulations for the operation of installations. Although the penalties are usually laid down in the enactment setting forth the instruction in question, the procedures for prosecution for an offence come under general provisions (e.g in France, Code of Penal Procedure, Code of Administrative Tribunals and of Administrative Courts of Appeal).

183. Some countries have a special administrative police regime comprising specific police forces. Thus in France there is the Police de la Grande Voirie (Highway Police), the regulations concerning which are contained in Title III of the Seaports Code. This regime is of interest to port authorities since persons committing an offence are not entitled to claim extenuating circumstances (except in the case of fault on the part of the port authority equivalent to a case of force majeure), and in principle the amount of compensation may not be challenged by the offender unless the sum claimed is manifestly disproportionate to the extent of the actual damage suffered. However, even if the offender is ordered by the administrative court to make good the injurious consequences of his action, the establishment of the fund for limitation of the liability of shipowners may be set against the port authority.

A. The exercise of authority by the special port police

184. This raises two questions:

Who exercises police authority in ports?

What is the extent of the duties of the authority responsible for the port police?

(a) Who exercises police authority in ports?

185. The authority responsible for the special police, who have a duty to ensure the normal functioning of the port, must have qualified personnel who meet criteria defined in the relevant laws and regulations. It is not open to anybody to take on police duties. The police force must be established by the competent authority and belong to a category defined in the laws and regulations.

186. In France, the Prefect of the Department is the sole person competent to initiate prosecution proceedings for offences against the Police de la Grande Voirie, regardless of the legal status of the port. The view has been taken that the director of an autonomous port does not have such authority, but he

may initiate criminal proceedings on the basis of a complaint for any offences under general principles of law (e.g. theft, damage to public buildings, assault, striking and wounding).

187. When an offence is reported, the magistrate is required, in the course of his examination, to ascertain whether the authority whose orders were flouted or the police officer reporting the offence was competent. If, for example, a ship's captain refuses to obey an order given by a person having no police authority, there is no offence, even if the facts are reported by an officer having competence to report an offence. The situation is the same if an offence is reported by a person who is not competent to do so.

(b) The extent of the duties of the authority responsible for the special port police

188. The officials responsible for the port police are above all required to organize shipping movements in the port. To this end, they ensure safety of maritime traffic within the confines of the port. For example, in accordance with article 5 of the port of Abidjan police regulations, "Port officers and supervisors shall ensure compliance with all general regulations concerning the policing and operation of the port and quayside railway lines, with the requirements to which equipment permits and concessions and temporary jobs are subject".

Article 6 reads:

"Port officers and harbour-masters shall supervise and control the lighting of lighthouses, buoys and the condition of signalling and marking devices throughout the port and its annexes.

"They shall keep themselves informed of the state of the seabed and conditions of navigability, and issue their orders accordingly ...".

Port officers have authority to issue orders to users. This authority is spelt out in article 23 of the police regulations of the port of Abidjan, which reads:

"Port officers may if necessary, with no formality other than two verbal orders, cut or order to be cut any moorings which a ship's captain refuses to cast off.

"They also have the right, in an emergency or in the event of failure to obey orders they have given, to go on board and, on the responsibility of the offenders, take all measures necessary for the manoeuvring of ships".

These provisions are also contained in article L/311-4 of the French Seaports Code. Apart from the organization of ships' movements, the port police are also responsible for reporting offences.

(c) The basis of the special port police: the general police regulations

189. In a number of countries, the principal requirements relating to the policing of ports are contained in the "port police regulations". In France these regulations supplement book III of the Seaports Code concerning policing of the maintenance and operation of ports.

190. The general police regulations contain the following provisions, among others:

- Firstly, for the purposes of the implementation of these regulations, article 1 defines certain concepts: "port director", "vessel", "ship", "boat", "small craft" and "buoyant apparatus";

- Requests for berths have to be submitted to the harbour-master. They must contain estimates of the duration of the stay in port, the characteristics of the ship and the nature of its cargo. They have to be submitted at least 48 hours in advance and confirmed 24 hours in advance;

- It is the responsibility of the port officers to determine the place which each vessel is to occupy;

- Ships' captains have to transmit to the harbour-master, 24 hours in advance or at the latest on leaving the previous port of call when this is less than 24 hours' sailing away, their expected time of arrival in the roads or at the mooring buoy in the approach channels, specifying:

- The date and time of arrival;

- The maximum draught of the ship;

- The nature and tonnage of the cargo;

- Any damage to the vessel or its equipment or cargo;

- The harbour-master may forbid from entering port vessels which would be liable to jeopardize the safety, maintenance or efficient operation of facilities;

- An express authorization to enter port by the harbour-master is obligatory for every vessel. Captains and pilots of all vessels must obey the orders given by port officers and supervisors;

- Any captain or master entering a port must on arrival hand to the harbour-master a written declaration specifying the name of his ship, the captain's name, the owner's name, the name of the ship's manager, the forwarding agent for the ship and the cargo, the broker, the tonnage of the ship, its draughts, its type, the nature of its cargo, the number of its passengers, its port of origin, its destination and the number of crew;

- In the case of fishing vessels, pleasure boats and small craft, the regulations for the assignment of a berth, the admission of vessels to the port, and the formalities relating to notification of entry and departure are laid down in special regulations which may vary from port to port;

- Special provisions are laid down for French and foreign naval vessels;

- The general police regulations specifically forbid anchoring in fairways. If a vessel is so anchored as a result of force majeure, the harbour-master must be informed immediately;

- Movements by ships are effected in accordance with the official signals and with the orders of port officers and supervisors. It is stipulated that "The movements of vessels in ports, roads and approach channels shall be effected at a speed that is not prejudicial to other vessels, maritime construction and salvage sites, channels, wharves, terminals";

- The harbour-master may make the assistance of tugs obligatory for ships' captains. The services of pilots are obligatory by law;

- The mooring of vessels is effected under the responsibility of ships' captains and masters. Only mooring devices specially designed for this purpose on structures may be used for mooring. The hawsers must be in good condition. If necessary, any captain, master or watchman must reinforce the mooring ropes and take all precautions required by the harbour-master.

- Captains and masters of vessels may at any time, for operational reasons, be required by port officers and supervisors to move their vessels;

- For obvious security reasons, the general police regulations make compulsory the presence on board of at least one watchman. If for the purposes of operations and the performance of work the vessel has to be moved, in the absence of sufficient crew members the port officers may call on tugs and the personnel necessary for the manoeuvre;

- The port authority determines the sites where goods are handled and where they may remain. Time-limits for the unloading of vessels are determined by local regulations;

- A vessel must leave its berth on expiry of the time-limit set for loading or unloading, or even earlier if its operations have been completed;

- Except as provided by a special regulation, goods must be removed as and when they are checked by the Customs service, and at the latest three days after this check. Beyond this time-limit, if orders have not been complied with, the harbour-master may order the goods to be removed or shifted.

- The general police regulations contain provisions intended to ensure the preservation of fairways and the depth of docks. They forbid the jettisoning of dangerous substances, refuse and objects of any nature in the waters of the port or allowing them to fall overboard. Ballast discharge operations are authorized by the harbour-master after verification of the quality of the ballast water;

- Goods which have gone rotten may not be left on port wharves or storage yards. If the person responsible for the goods fails to have them removed immediately after unloading, this action is taken automatically, at that person's expense, when requested by the harbour-master.

- At the end of each work period, the captain or master of a vessel is required to have the surface of the wharf opposite the vessel cleaned over a width of 25 metres alongside the whole length of the vessel;

- For safety reasons, it is forbidden to light fires on wharves or storage yards less than 25 metres from the coping of wharves or goods depots (except when authorized by the harbour-master);

- Smoking is forbidden in the holds of a ship as soon as it enters port, and in storage yards and sheds where dangerous substances are stored;

- As soon as a vessel berths, the harbour-master hands to the captain the fire prevention instructions. The detailed plans of the ship and the loading plan must be kept on board so that they may be rapidly made available to the harbour-master;

- Access to fire hydrants, sirens and other equipment must always remain unimpeded;

- The harbour-master must be informed of the type and duration of work done on a vessel moored outside affected berths;

- The testing of motor-driven apparatus may be undertaken only with the authorization of the harbour-master, who shall, in each case, determine the conditions of testing. Full-power testing is forbidden;

- The launching of a vessel must be notified to the harbour-master at least three days in advance and may not take place without his authorization;

- In order to avoid the blocking of port fairways by wrecks, the general police regulations stipulate that "Every vessel shall be kept in a good state of maintenance, buoyancy and safety";

- The owners of disabled ships which are in danger of sinking are required to repair or remove them;

- It is forbidden:

  - To drive or park vehicles on the coping of wharves or the surface of storage yards, rails or underground facilities without having previously protected these facilities;

  - To load or unload goods liable to damage port facilities;

- The special police regulations for seaports may determine conditions of access by persons to the port. In any event, the provisions of ordinary law concerning road traffic apply to port roads open to the public;

- Without going into details, the general police regulations provide that goods may be stored only in marked areas or in accordance with instructions given by port authority officials;

- Port users are reminded that handling equipment must be put away at the end of each work period so as to ensure that it does not impede traffic and manoeuvres on wharves, storage yards and fairways;

- Lastly, the general police regulations provide that "The execution of works and construction of facilities of any kind on wharves and storage yards are subject to authorization by the port director".

B. Prosecution proceedings

191. In very general terms, it may be said that the commission of an offence entails:

The reporting of the facts;

Punishment.

(a) Reporting the facts

192. Arbitrary action is excluded in a State subject to the rule of law. It should be noted, first of all, that especially in the statute-law countries there can be no punishment without a corresponding legal provision. In other words, any offence, together with the corresponding penalty, must be defined in an enactment. The definition of the offence must precede the acts in respect of which punishment is imposed. One of the fundamental principles of law lies in the non-retroactivity of criminal law.

193. When drawing up a report, it is important to know the relevant facts. Ignorance of the law is not held to be an excuse, particularly among those responsible for enforcing it or for reporting infringements, but the reporting officer is not always able to assess the extent of an offence. The important point is to describe the facts as precisely as possible in a report. The reporting officer must remember that his report is intended to be examined by a court which is not acquainted with the situation in question and that the court should be informed of it in the best possible way. Generally speaking, the reporting officer should be the direct witness of the offence. However, the courts of certain countries admit the validity of reports containing

information gathered from tnird parties, provided the defendant acknowledges the facts and that the facts are corroborated by the findings of the investigation. Reporting officers are not asked to lay down the law, but only to report facts as clearly and precisely as possible.

(b) Punishment

194. If an act constitutes a disturbance of the established order, this situation calls for a penalty. The penalty may be imposed in two ways:

Imposition of a statutory fine; or

Sentencing by a court.

(i) Statutory fine

195. When there is no doubt about the circumstances of certain offences and if the offences have not caused damage, the relevant legal provisions may provide for the possibility for the reporting officers to collect a statutory fine, the amount of which corresponds to that of the category of offence in question. This measure enables judicial proceedings to be avoided and has the further advantage of ensuring that the proceeds of the fines immediately enter the "coffers" of the State. The disadvantage of this system lies in the fact that the offender does not have time to prepare his defence. It should be added that, because of the statutory nature of the fine, the circumstances in which the acts charged occurred cannot be taken into account. It is possible to contest the offence reported before the court of the place in which the acts took place. In this case, the offender, while endeavouring to secure his acquittal, nevertheless runs the risk of a more serious sentence if he is found guilty.

(ii) Sentencing by a court

196. When the possibility of the immediate collection of a statutory fine is not legally provided for, the offender is summoned before a judge. He has the possibility of defending himself or being assisted by a counsel. As we have already stated, the report constitutes the basic element in prosecution proceedings. In the light of the facts it describes, the judge will have to ascertain whether an offence has been committed.

IV. Other types of policing in seaports

197. Even when there is a special police force in ports, there may also be other types of policing because the port does not have extraterritorial status. Consequently, any disturbances of public order in a port, such as the blocking of entrances by demonstrators, are punishable according to general principles of law and it is usually the responsibility of the State police alone (or the municipal police, if any) to intervene and put an end to the disturbance. As far as penalties are concerned, the accumulation of offences is possible; in France, the sentences passed for disturbing public order can run concurrently with those concerning the Police de la Grande Voirie which are passed following the same event.

198. In France, policing of signs and signals and dangerous materials is separate from policing of the operation of ports. The justification for this situation is to be found in the fact that maritime signalling devices may be set up outside ports (e.g. in access channels) or within ports (e.g. lighthouses), but they may also be used for non-port navigation.

199. Whereas offences relating to the policing of port operations come under the Grande Voirie rules, where disputes are dealt with by the administrative courts, the punishment of offences relating to signs and signals comes under the ordinary courts (Tribunal Correctional).

200. In many European countries, port areas are not enclosed and the main roads within them are open to public traffic. Sometimes, local political leaders, such as mayors, exercise police authority over public safety and health throughout the territory for which they are responsible, including the parts of the port areas open to the public. In that respect, they must ensure the safety of the public and undertake responsibility for disaster prevention.

201. Other examples of policing of the port area include the policing of fisheries. In the big ports, marine cultivation concessions are sometimes granted, and while the use of the soil falls within the purview of the seaport police, aquaculture and shellfish breeding are the concern of the fisheries police as regards conditions of farming of products of the sea, health standards, and the size of fish or shellfish.

202. In some countries, the protection of port waters in terms of their cleanliness and quality is ensured by the water police and extends to all surface water and groundwater.

203. Of all the kinds of policing likely to be effected in a port, attention will again be drawn to the policing of maritime navigation which is regulated by internal legislation or by international conventions and concerns conditions of navigation and the observance of security standards. If a ship fails to comply with the standards laid down, it may be detained in port until the necessary corrective action has been taken. In such a case, the policing of maritime navigation may constitute an obstacle to the operation of the port.

CHAPTER V. THE OPERATION OF PORTS

204. The legislation governing operation covers several aspects of port activities. It covers both the operation of installations and activities within the various occupations that make up the port community. Operation comprises the totality of services that ensure the functioning of the port as far as users (shipowners, loaders, cargo handlers, etc.) are concerned.

I. The rules of port operation

205. The rules of port operation when they exist, usually contain provisions relating to the use of installations or equipment and rules for the transfer of responsibility to the user. The rules of operation set forth the standard provisions of contracts for the use of equipment and structures. These contracts represent contracts of adhesion because they refer essentially to those provisions and to those established in the tariff for use of public equipment.

206. The use of public equipment forms part of the functioning of a public industrial and commercial service; contracts concluded for this purpose are contracts in private law.

207. Contracts of adhesion have the advantage of containing only one reference to the pre-established standard clauses and are drawn up on a very simplified form. In practice, the contracts are often verbal, but they are being increasingly recorded by telematic means.

208. Once the rules of operation have been approved by the deliberating assembly or governing body of a port, they become enforceable, particularly in respect of third parties to contracts for the use of equipment and structures. Non-compliance with these rules is punishable if necessary, by a criminal fine (in France, this can be done on the basis of the Seaports Code and the port police regulations or under article R26-15/ of the Penal Code).

209. In seaports two situations may arise:

- Rules of operation may be established for all equipment and structures; or

- Rules of operation may be established for each category of equipment and structure.

210. The second solution appears preferable to the first because its presentation is simpler. The clauses in the document given to users cover only the type of installation used, and furthermore it is easier to amend the conditions of use of a single piece of equipment rather than those relating to all equipment.

211. The sphere of application of the rules of operation varies depending on the type of services provided by the port authority; thus in some ports, it is the port authority which provides piloting and towing services, and even supervises goods on wharves and storage yards; in other ports, the competent

authority confines itself to authorizing the admission of ships into port, handling operations being taken care of by shipboard equipment and personnel or by private companies.

What should be included in any rules of operation?

212. Firstly, they should state their purpose, which may be either general, in other words, applicable to all the installations, or specific (e.g. operation of warehouses and storage areas, operation of hoisting equipment and handling installations, operation of ship repair installations, operation of container or oil tanker terminals). The rules of operation, must necessarily be in conformity with the laws and regulations of the country.

213. Secondly, the provisions of the rules of operation are dependent on the purpose of these rules.

Hoisting and handling equipment

214. The tendency today is to ensure that the equipment is bought and run by the operators. Thus in the port of Antwerp, in the space of about 20 years, total public equipment fell from 80 per cent of the port's total equipment to about 20 per cent only.

215. However, there are many ports (tool ports) which still have public equipment that is placed at the disposal of users by the port authority. In such cases, the following advice may be helpful:

- Applications for use: it should be specified where, how and to whom they should be submitted.

- When the port authority does not itself organize cargo handling, it should transfer legal protection of the installations to users. This transfer should take place from the time the equipment is placed at the user's disposal until it is returned.

- The conditions for the operation of equipment should be spelled out (by port authority staff or by staff working for the users). When port authority staff operate the equipment, it should be made clear that they are working under the authority and responsibility of the user.

- The terms and conditions for the rental of equipment should be set forth in the rules of operation; thus it is often specified that the equipment is rented "bare hook" and that it is the responsibility of the user to provide chains, ropes and slings for gripping loads.

- Users should be forbidden to use equipment beyond its technical capacity (e.g. strength and reach).

- The port authority should reserve the right to verify the conditions under which structures and equipment are used and, if necessary, to suspend handling operations in case of danger.

- The rules of operation should include general provisions, applicable also to third parties. For example, they should prohibit:

  - Parking or walking below loads suspended from the hooks of hoisting equipment;

  - Blocking railway lines and the adjacent area with machines and equipment.

- The port authority should make it obligatory for users to take safety precautions such as removing any obstacles from the work area of hoisting equipment or preventing loads from swaying during hoisting operations.

- The terms of application of tariffs are often set out in the rules of operation (e.g. the starting time and termination of the rental, whether or not insurance charges are included in the cost of the rental, the place and time-limit for payment, whether payment of a deposit or bond is required).

- In ports where companies undertake cargo handling with public equipment, it should always be stipulated that users must return the equipment in the same condition as that in which they received it.

- Conditions for making wharfside equipment and buoyant apparatus available are also specified in the rules of operation (e.g. setting up, moving, responsibility in the event of damage to such equipment, conditions for the billing of down time).

- In order to monitor how installations are being used, users must include a description in their rental application of the physical and/or chemical characteristics of the goods to be handled. The port authority reserves the right to refuse to handle goods or packages that are liable to damage its installations.

- The rules of operation usually contain provisions on the use of ships' horizontal handling equipment. Their purpose is to enable the port authority to interrupt operations because of bad weather, risks of accident or reasons relating to the proper use of structures. The speed limit for vehicles on access ramps to ships is very low (5 km/h).

- There may be an indication that miscellaneous equipment (e.g. grain hoppers, skips, mobile elevators, wagon gangways) which does not require any specific provisions is rented bare at the depot. Transport to the place where the equipment is to be used and back to the depot is at the users' expense.

- In order to avoid disputes relating to the applicable provisions, the rules of operation must specify the date of their entry into force.

Container terminals:

216. These facilities are administered by an operator, who is often the holder of a concession from the port authority. The provisions of the rules of operation relating to this type of activity include the following:

- Persons entering terminals, enterprises exercising an activity in terminals and owners and packers of goods containers are expected to abide by the rules;

- The access of persons to terminals is subject to the presentation of a permanent or temporary authorization. Permanent authorizations are issued for one year in the form of a card bearing the photograph and signature of the person concerned;

- Permanent or temporary authorizations specify whether the holder is allowed to enter the terminal with a vehicle; if so, they show the vehicle registration number;

- For vehicles on which containers are loaded, an entry voucher serves as an authorization;

- The use of the authorization for access to the terminal implies that the holder agrees at all times to undergo checks made by agents of the terminal manager or the port authority.

- The movement and parking of road vehicles is one of the main concerns of container terminal managers. In general, the rules of operation provide that:

- All other vehicles inside a container terminal must keep clear of handling equipment and give way to it in all circumstances;

- Vehicles authorized for use within the terminal must follow marked lanes and park in reserved spaces;

- Marked lanes must be kept clear;

- Parking time in lots at the entrance to terminals is limited (usually to one hour). The parking of unhitched loaded trailers is prohibited. Illegally parked trailers will be removed at the expense and risk of the transport company concerned to a long-term parking lot;

- Loaded tractors and trailers awaiting admission to the terminal or departing to the hinterland may stay in long-term parking lots for an unlimited time;

- An "entry voucher" is required for access to certain terminals; it is issued by the manager upon presentation of the basic declaration of entry into the Customs clearance or export area;

- Special requirements for loaded containers arriving by rail may be imposed, as may requirements for empty containers arriving by road or by rail; empty containers must be clean;

- Conditions for the unpacking of containers must be specified in, or annexed to the rules of operation, with an indication of slot, storage time, deadline for automatic removal, etc.;

- With regard to the storage of dangerous substances, the terminal's rules of operation often refer simply to local regulations for the transport and handling of dangerous substances (statement of the type of product, type of packaging, special storage conditions, maximum capacity).

- An area for the repair and cleaning of containers may be assigned in the rules of operation; the time limit and conditions for the use of the area are also mentioned;

- A clause must be included on conditiors for the engagement or waiver of the responsibility of the terminal manager, who is often not liable, unless he has been proved to have committed a fault, for the loss of or damage to goods resulting from:

- A fire;

- Acts constituting an event not attributable to him;

- A strike, a lock-out or a partial or total work disturbance, regardless of the cause;

- Fault by the loader as a result, for example, of the improper packing or marking of the goods;

- A defect in the goods themselves.

217. Attention should, however, be drawn to the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, adopted in Vienna on 19 April 1991. This Convention contains rules on liability in the event of loss, damage or delay in handing over the goods which operators of transport terminals have taken in charge and which are not covered by transport regulations contained in the conventions applicable to the various modes of transport. A presumption of liability exists for terminal operators and it may be waived only if they prove that they have taken all measures required to avoid the occurrence and its consequences. An extended delay in the delivery of goods by the operator must be regarded as comparable to the loss of the goods when the operator does not hand them over to the person authorized to take delivery of them within a period of 30 consecutive days after the agreed date of the request for delivery.

218. The Convention of 19 April 1991 establishes a regime limiting the liability of the operator in the event of loss of or damage to the goods. However, the operator is not allowed to limit his liability through contractual provisions. Other provisions of the Convention relate to:

- Conditions for the reception of dangerous goods in terminals;

- The operator's right of security over goods entrusted to him;

- Conditions for notification of loss, damage or delay.

219. The Convention will enter into force one year after its ratification by five countries.

Sheds and open storage yards:

220. The use of sheds and open storage yards managed by the port authority is usually subject to special seaport police rules in countries where such rules exist, particularly with a view to protecting them from damage by third parties, but conditions for use are defined in the rules of operation or in the "tariff".

221. The latter rules are different from those relating to the legal regime of operation (e.g. authorization for temporary use, public equipment concession, authorization for private equipment with an obligation to provide public service).

222. The main conditions referred to in the rules of operation of French ports are the following:

- The port authority gives priority to the unloading of goods in transit in the port;

- Sheds and open storage yards are operated according to ordinary rules or are subject to a special regime for a period of time (usually one year) renewable tacitly;

- Goods are unloaded in open storage yards under the supervision of port officers and supervisors. Unloading must be authorized by a qualified agent of the port authority or the manager of the area concerned;

- The storage authorization is issued upon presentation of an application recorded in order of arrival. A ship placed by the harbour-master's office in front of a shed or open storage yard has priority for the use of these facilities;

- The port authority reserves the right to refuse to store goods which are liable to damage port installations (e.g. risk of explosion or fire) or other goods;

- Goods are stored in such a way that spaces are left between them for safety reasons and in order to make handling easier. They must not lean against the walls of buildings, but must be properly piled and stacked.

223. If no action has been taken on a notification, the rules of operation provide that port authority personnel may move and restow the goods at the owners' expense and risk.

- Dangerous, rotten or dirty goods may be stored only in parts of sheds and open storage yards intended for this purpose;

- Specific storage measures are required for cotton and other plant fibres; a limit is set for the storable weight allowed in each shed intended for this purpose;

- A permit issued by the manager of the storage area is required in order to remove the goods, so that the amount of the user's fee may be calculated in advance;

- It should be borne in mind at all times that the goods are the responsibility of their owner or his representative;

- The rules of operation provide that users must carry out all operations relating to goods reception, handling and delivery. Users are responsible for the goods and their preservation.

224. Except where it commits a serious fault, the port authority cannot bear responsibility for the loss of or damage to goods unless it is the operator of a transport terminal within the meaning of the Vienna Convention of April 1991.

- In order to guarantee the security of installations, the rules of operation require users to clean storage and adjacent areas after handling operations and the departure of the goods;

- Users are liable for the cost of repairing sheds and storage yards damaged during use;

- Insurance policies against fires in buildings taken out by the port authority may provide that the insurers of the port authority agree not to take action against the owners and handlers of goods, although this waiver does not rule out the possibility of action by the port authority;

- Conditions of access to sheds are dealt with in an important provision of the rules of operation, which set opening hours and conditions for the issue of authorization for access;

- Handling must be done rapidly and in the best possible safety conditions;

- Requirements for the application of the users' tariff are also stated in the rules of operation (e.g. point of departure of billing, inclusion of insurance costs in the price);

- There may be special provisions for certain facilities (e.g. passenger harbour stations, air-conditioned sheds, bulk cargo depot, dangerous goods store, and timber store, livestock quarantine station).

II. Port usages in the area of handling

225. Usage emerges as an informal source of law. In speaking of port usage, one must also define it and differentiate it from maritime usage or local regulations. Even in the statute-law countries, each port has its own usages,

and these have a limited territorial sphere of application. It should, however, be added that many usages are common to several ports, if not a whole coastline, but this still does not mean that they are not port usages.

226. When a usage is reflected in a local regulation, can one still talk of a port usage? In practice it all depends on the authority issuing the regulation: if it is an authority having the constitutional or legal power to do so, one must speak of a regulation (alien to the concept of usage); if what is involved is codification, by decision of a chamber of commerce and industry, of usages specified in attestations or in a particular instrument (e.g. "Regulations relating to the management of warehouses, concessions and storage yards" of the port of Rouen), one must still speak of a port usage.

227. What is the situation of usage vis-à-vis the law? Usage may be:

"Secundum legem" (usage to which the law expressly refers);

"Praeter legem" (usage which does not correspond to any reference in law but exists alongside the law, without running counter to it); or

"Contra legem" (usage contrary to the law).

228. The second usage ("praeter legem") presents the simplest situation since the law, which is neutral vis-à-vis usage, does not back it up or contradict it and allows usage its own validity. In this case, usage originates from the free organization of individuals (or groups) and finds its full value subject to what has just been stated about its legal force (conventional, residual or binding). Unlike instruments which, despite their profusion, evolve only slowly and intermittently, usages are patterned on the economy and technology, evolving very steadily and smoothly.

229. Some ports, such as Marseilles, have achieved a kind of codification of their usages. Others, far more numerous, apply certain written or unwritten usages, known primarily to the persons working on the spot, while others have practically no usages. Essentially, port usages are to be found in the loading and unloading of goods, in the area of either handling or the preparation of the goods and the ship. Others are to be found in transport, in relation to the goods and in relation to the ship. With the increase in shipping, handling has assumed great importance and covers the bulk of port activity.

230. Companies dealing in handling, an activity peculiar to shipping as a type of transport, undertake the loading and unloading of ships and, on a subsidiary basis - especially in the Mediterranean ports, the related operations of reception, storage and delivery of goods.

231. In France, article 80 of Decree No. 66-1078 of 31 December 1966 expressly refers to port usages with regard to the supplementary services (in addition to loading, unloading storage or removal from storage) of handling companies. In Marseille and all the French Mediterranean ports (the port of Marseille having practices peculiar to the Mediterranean, very similar to those of Genoa and Barcelona), the "lighterman" is known to have a much broader role and responsibility than those of the ordinary "stevedores" to be found in the

Channel and Atlantic ports. But what is involved here is actually no longer a usage since it has been regulated, as it were, by article 51 of Act No. 66-420 of 18 June 1966 and article 80 of Decree No. 66-1078 of 31 December 1966.

232. In connection with the functioning of port undertakings, two types of usage may be noted. First, those concerning contractual relationships between the undertaking and its contracting parties. This is the case in the port of Rouen with simplified checking (checking of goods condensed to two operations instead of four) and the wagon equalization tax (collected by consignees for all goods loading or unloading in Rouen and paid into an equalization fund which covers the cost of parking wagons for five days). This measure is intended to promote exports.

233. In Marseilles there is currently a usage in accordance with which quayside parking and guarding of goods for export are free for 15 days, with certain exceptions granted by the ship's agent in specific cases.

234. Next there are usages aimed at organizing relations between handling companies (police usages). Thus, in the port of Rouen, there is a usage - contested by some but recognized as such by a judicial decision - in accordance with which one company can move the wagons of another company to another berth if its own movements so require, without regard for the interests or risks of that other company. Also in Rouen, a handling company which has to work on a second ship after the first ship has been loaded may request the port director officially to order the first ship to leave.

235. Many usages (and also privileges) concern handling personnel. In some ports, the organization of handling is still subject to usages imposed by social considerations concerning, for example, working hours and norms and other practices in some cases inherited from the past. Each port also has usages with regard to the organization of the work of dockers, not only the various categories of worker (gaffer, shunter, winchman, lander, mast man, porter, puller, hooker, unhooker, etc.) but also personnel with wider responsibilities (foreman, team leader, etc.).

III. Concessions for public equipment and installations

236. Generally speaking, it is not the policy of the public authority to manage all the services over which it exercises control. Certain public services have to be managed directly by the authority responsible for them (e.g. the police); on the other hand, the management of most public services having an effect on economic activity is often undertaken by some other public or private person (this is the case with the management of port installations). Some countries authorize this transfer of management of a public service by means of the concession system. The public service is defined not so much by its purpose as by its regime. The particular rules applicable to an activity organized by a public person (the State, the commune, a public institution, etc.) confer on this activity its character as a public service (e.g. admission of ships to a port).

237. The public service concession is a contract by means of which a public body entrusts the management of a public service to a third party. As Professor Llorens has stated, "the concession of service takes the form of a contract by means of which a public person entrusts to another person, whether

public or private, responsibility for a public service for which he finances at least some of the installations and which he manages on his own account for a duration which should not be brief; that person will earn remuneration at least partially by charging user fees". The latter criterion is important because it makes it possible to distinguish the concession from a public contract. A contract cannot be described as a concession unless the other contracting party derives his remuneration, at least in part, from the earnings received directly from users; conversely, if the remuneration of the other contracting party is ensured by means of a fee paid by the public authority, the contract must be described as such.

238. There are public service concessions and public works concessions. In French law, a concession for operation of port installations is often of a mixed nature because it entails the construction of facilities and subsequently their operation by the concession-holder; in this situation the concession of public works is absorbed in the concession of the public service. This regime is to be found in Belgium (Royal Order of 14 November 1979), where the concession of facilities concerns both the construction of the facility serving as a basis for the public service and management of the facility.

239. Then there is the case of intermediate contracts (which are neither concessions nor public contracts) whose purpose is to ensure that a service is financed and operated by a company, which derives its remuneration from the all-in price it charges its clients. In this case one speaks of a "delegated management" contract or quasi-concession.

240. Within the European Economic Community, supervision is exercised over conditions for the granting of concessions if they are liable to affect the principle of free competition. For the moment, the Community's Council of Ministers has excluded public service concessions from the scope of the directive on public service contracts.

241. Although Council Directive 89/440 of 18 July 1989 amending Directive 71/305 of 26 July 1971 concerning coordination of procedures for the award of public works contracts defines a "public works concession" as "a contract ... (where) the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment", this category of contract is not applicable in the excluded sectors, among which is transport. The concession of works in EEC ports may shortly be expected to be made subject to prior publicity and competitive bidding.

242. This legal regime, which has until now not been widespread in the European countries, is likely to grow substantially thanks to Community law. It enables public facilities to be financed by third parties, who are remunerated by charging users a fee. The concession-holder takes responsibility for the construction and operation of the facility, while the authority granting the concession is responsible vis-à-vis third parties only in event of insolvency of the concession-holder.

243. Even though the constituent texts make no provision on this point, the granting authority may at any time terminate the concession for a reason in

the general interest (e.g. reorganization of the port service, inadequate performance). In this case it is required to compensate the concession-holder.

244. In the United States, three tariff systems are applied to concessions:

(1) The fixed sum system: The owner gives his lessee the right to use a port installation for a fixed sum. The advantage of this system is that it encourages the lessee to develop his activities on a counterpart basis. If traffic estimates were too low, the port authority subsidizes the user.

(2) The mini-maxi system: The owner, in other words, the port authority in this case, leases or grants a concession for a part of the port to a user in return for a variable sum. There is a floor and a ceiling for the fee due related to the level of annual traffic. Under this system, the port may subsidize the new lessee, but only when traffic exceeds the envisaged maximum.

(3) The revenue sharing system: The company imposes no ceiling on the fee payable by the lessee, although there is often a floor. This is the best system if the port wishes to maximize its profit, employment and traffic without subsidizing users.

Concessions relating to the operation of public equipment

245. The port authority may operate the public equipment under State control, but in most cases it entrusts management of the equipment to a concession-holder, who may be a public (e.g. public institution, local body) or a private entity (e.g. limited liability company, community of interests group). It should be made clear that authorizations for the operation of private equipment may be granted despite the existence of public equipment in the port.

(a) The legal regime applicable to concessions concerning works and installations

246. The regime governing structures and equipment built or acquired by the concession-holder varies according to whether the property concerned is "return property" (Biens de retour) or "property for recovery of possession" (biens de reprise).

247. "Return property" is property in respect of which the general conditions specify that the property will, on termination of the concession, on a compulsory basis and free of charge, become the property of the body granting the concession. In practice, the French Council of State (the highest administrative jurisdiction) considers that "return property" belongs, from the time of its construction or acquisition, to the public authority granting the concession; it forms part of the public domain from the outset.

248. "Property for recovery of possession" is that which, on being assigned for service, may be acquired by the body granting the concession on

termination of the concession for a specific price or a price to be determined, and in respect of which the concession-holder may not oppose recovery.

249. The construction of facilities constituting return property gives rise to the execution of public works and may, when the concession-holder is subject thereto, give rise to application of the regulations on public contracts.

250. The regime of "return property" and "property for recovery of possession" seems peculiar to France. In Belgium, on expiry of the concession, the concession-holder is required to return the land to its original state. He is therefore considered to be the owner of the installations for the duration of the contract.

(b) The duration of the concession of public equipment

251. The concession of public equipment constitutes primarily a contract for occupation of the public domain; it is always possible for the port authority to terminate it, for a reason in the general interest. The rule of the precariousness of occupation of the public domain therefore applies to concessions of public equipment.

252. It is traditionally accepted that the duration of the concession must be at least equal to the duration of amortization (obsolescence) of the installations and facilities covered by the concession. The management of a public service cannot in any event be envisaged over a short period, not only, of course, because of the need to amortize the substantial initial investments, but also in order to be able to develop over time an effective commercial strategy.

253. In France, the average term of concessions of public equipment is 20 to 30 years, and in the case of major investments by the concession-holder for the construction of wharves and docks, the term may be increased to 50 years. In many cases, the term of the initial concession is extended for a period identical with the first period.

254. The port authority (the body granting the concession) may terminate the concession at any time for a reason in the general interest in one of the following ways:

Withdrawal;

Repurchase; or

Default.

The early termination of the concession may also occur following the cancellation of the act of concession by a court or through termination at the request of the concession-holder or as a result of his going out of business (e.g. winding-up).

(c) The technical and financial conditions for the concession of public equipment

255. The principal conditions relating to the concession are set forth in the general conditions; they relate, in particular, to:

(i) The object of the concession

256. The object of the concession is the definition of the sphere of application of the concession. For what is the concession being granted? The construction and operation of public equipment. This definition enables the activity of the concession-holder to be monitored; thus, he may not attribute to the conditions relating to the concession expenditure corresponding to activities which are not consistent with the object mentioned in the general conditions. Conversely, the body granting the concession will not be authorized to impose on him charges unconnected with the said object.

257. If the object of the concession is in most cases imprecise, the general conditions, on the other hand, often contain an exhaustive list of the installations and facilities covered by the concession. Any new construction or any withdrawal of an installation must in principle be covered by the signing of an endorsement.

(ii) The technical conditions

258. The authority granting the concession reserves the right to approve work projects after having defined the procedures for their execution, not only at the outset, but also during the whole period, of the concession. It is often stipulated in the general conditions that the entry into operation of a facility or equipment may be authorized only after verification and testing by a supervisory body approved by the granting authority. Among the measures stipulated for concession-holders, one notes maritime or river signalling, the lighting of workplaces and installations, compulsory health and safety measures, etc. Apart from the threat of default, the general conditions often stipulate that, in the event of non-compliance with the obligations incumbent on the concession-holder, the granting body may take action ex officio at the expense and risk of the person concerned.

(iii) The financial conditions

Domanial fee:

259. The concession of public equipment constitutes a regime for occupancy of the public domain. This situation justifies payment of a fee, the amount of which is set by the port authority. It may vary to take account of different practical situations.

User tariffs

260. The occupant of the public domain is not generally free to fix the user tariff for his installations. The granting authority is responsible for ensuring the efficient operation of the public service, and controls the level of the tariffs charged by the concession-holder.

The financial conditions of withdrawal or repurchase

261. In France, the installations covered by the concession, although financed by the holder, belong from the time of their construction or acquisition to the granting authority, which nevertheless guarantees a minimum period of operation. In the event of the early termination of the concession at the request of the granting authority, the latter will in principle have to compensate the concession-holder. The conditions for such compensation will be laid down in the general conditions.

262. Generally speaking, there are three alternative legal regimes applicable in the event of early termination of the concession:

Withdrawal: This concerns concessions granted to bodies corporate in public law. The latter are not of a profit-making nature and so the general conditions stipulate that, in the event of withdrawal of the concession, no compensation is paid to the holder. On the other hand, the granting authority assumes responsibility for repayment of any outstanding loan instalments.

Default: Although this is a penalty, its application gives rise to the payment of compensation to the concession-holder. This compensation represents in practice part of the value of the non-revalued original investments, minus the amortization charges paid.

Repurchase of the concession of public equipment: When the concession is granted to a physical or legal person in private law, any early withdrawal will entail the payment of compensation to the holder. In this case, one speaks of repurchase of the concession. Traditionally, the general conditions stipulate the method of calculation of the amount to be repaid to the holder for the period remaining until expiry of the term of the concession initially envisaged.

IV. Health and safety regulations

263. Any collective work involves specific dangers and requires the coordination of activities. Regulations contain provisions requiring employers to improve occupational safety and health conditions.

Dock workers have special working conditions:

Different workplaces (ships are often different from one another);

Coordination of work with constantly changing partners (e.g. use of ships' equipment by crews);

Lack of space in areas where activity is intense;

Pollution and noise in ships' holds, which are difficult to get to with cargo-handling equipment, both in the daytime and at night.

264. Each State's legislation and regulations protect dock workers' safety. The International Labour Organisation (ILO) drafted and adopted International Labour Convention No. 152 concerning Occupational Safety and Health in Dock Work, which was signed in Geneva on 25 June 1979 and entered into force

on 30 July 1986. The Convention invites States parties to include the provisions it contains in their legislation. The purpose of the provisions contained in the Convention is to invite States parties to impose measures, through their national legislation, to guarantee the safety of wage-earners engaged in dock work, particularly by providing and maintaining workplaces, equipment and methods of work.

265. Information, training and supervision are necessary to ensure the protection of workers against risks of accident or injury to health. Information must be made available on potential dangers, requirements for the use of equipment and the handling of cargo, as well as on safety measures and rescue facilities. Training is intended to improve workers' skills, in order to increase their output and to enhance their knowledge of safety measures. Supervision is also an important operation that is carried out either on a continuing basis (cargo stowage) or periodically (annual inspection of lifting equipment).

266. There will be arrangements under which workers:

Are required neither to interfere without due cause with the operation of, nor to misuse, any safety device or appliance provided for their own protection or the protection of others;

Take reasonable care for their own safety and that of other persons who may be affected by their acts or omissions at work; and

Report forthwith to their immediate supervisor any situation involving risks which they cannot correct themselves.

267. It should be noted that, according to article 5, paragraph 2, of the Convention: "Whenever two or more employers undertake activities simultaneously at one workplace, they shall have the duty to collaborate in order to comply with the prescribed measures, without prejudice to the responsibility of each employer for the health and safety of his employees".

268. The provisions contained in the Convention also include the following:

"All places where dock work is being carried out and any approaches thereto shall be suitably and adequately lighted.

"All surfaces used for vehicle traffic or for the stacking of goods or materials shall be suitable for the purpose and properly maintained.

"Where goods or materials are stacked, stowed, unstacked or unstowed, the work shall be done in a safe and orderly manner having regard to the nature of the goods or materials and their packing.

"Passageways of adequate width shall be left to permit the safe use of vehicles and cargo-handling appliances.

"Suitable and adequate means for fighting fire shall be provided and kept available for use where dock work is carried out.

"All dangerous parts of machinery shall be effectively guarded, unless they are in such a position or of such a construction as to be as safe as they would be if effectively guarded".

269. It should be noted that the Convention also contains provisions relating to cargo-handling on board ships and requirements for the use of equipment, as well as recommendations on the design, construction and use of lifting appliances and loose gear.

270. In internal law, States adopt binding measures to ensure compliance with the rules relating to occupational health and safety. These are general instruments that apply to all occupations.

271. Any bodily injury is costly for the national community. When a social security system exists, the agency responsible for its management pays disability benefits out of "public" funds. The larger the number of injured persons, the heavier the cost for the community and the more the potential of skilled persons is affected.

272. In order to eliminate accident risks in a port area, measures must be taken with a view to:

Providing the necessary workplaces to guarantee the protection of workers against risks of accident or injury to health arising out of or in the course of their employment;

Providing workers with personal protective equipment;

Developing and establishing proper procedures to deal with any emergency situations which may arise;

Providing and maintaining suitable and adequate first-aid and rescue facilities;

Effective measures (fencing, flagging or other suitable means, including, where necessary, cessation of work) to protect the workers until the work-place has been made safe again;

The lighting of places where dock work is being carried out;

The removal of any obstacle liable to be dangerous to the movement of a lifting appliance.

273. Although safety is a concern that mainly affects people, it is also an obvious factor that affects output.

274. As a result of the implementation of such measures, it should be possible:

To avoid accidents and breakdowns that might temporarily halt the operation of the facility in question and involve costly repairs;

To protect the port's reputation so that its use does not involve the payment of a surcharge, as such a situation would increase the cost of cargo movement.

275. It may be said that guaranteeing the safety of cargo-handling operations is a kind of long-term investment. Cooperation between the port authority and cargo-handling firms is essential in order to guarantee occupational safety.

V. The legal regime governing dock work

276. Dock work is regulated in all countries, either by the ordinary labour law or by specific rules. In the latter case, there is sometimes a highly developed social system (e.g. compensation for periods of unemployment or illness and a retirement scheme).

277. At present, a debate is taking place in various western European countries as to whether or not it is necessary to retain the dockers' monopoly of hiring for cargo handling in ports. The question which has now arisen is whether, after half a century of experience, there is justification for keeping the occupational status of dock workers.

(a) Administrative organization of dock work and the occupational status of dock workers

278. In the Western European countries, even where there is a dock work organization, the dock workers are usually employed by cargo-handling firms and not by the port authorities.

279. In the United Kingdom, the Government put an end, in July 1989, to the National Dock Labour Scheme (NDLS) which, for more than 40 years, had regulated the employment of dockers in British ports.

280. There is no longer such a thing as a registered dock worker and the cargo-handlers, who are called cargo operators or port workers, are capable of doing the various jobs for which they are responsible. Nowadays, cargo handling can be carried out freely using ship-borne equipment. For their part, dock workers are now subject to general principles of law.

281. Whereas the NDLS had entailed the cancelling of all private handling operations in the major British ports, the trend nowadays is in the opposite direction. 5/

282. In Italy, cargo handling in ports is now regulated by the Shipping Code. Article 108 provides that the harbour-master shall be responsible for controlling and supervising handling operations; article 109 adds that, in ports where the amount of traffic so requires, dock work offices shall be responsible for controlling port operations.

283. Article 110 of the Code provides that the workers responsible for port operations shall form companies or collectivities, supervised by the authority responsible for controlling dock work. The companies shall have legal personality. The technical organization of the work takes place for the benefit of the "companies". In other words, the dock workers belonging to the companies have a monopoly of employment. An anti-trust act, approved by the

Italian Parliament on 10 October 1990, took into consideration the rules of the Treaty of Rome and, to all intents and purposes, abolished the reservation of work for dockers. 6/

284. In Senegal, the port authority is not responsible for organizing dock work. Decree No. 70-181 of 20 February 1970 fixes the special conditions of employment of dock workers in the autonomous port of Dakar. This instrument provides that dockers' cards (permanent or temporary) are to be issued by the Port Labour Office (BMPO), which "shall be organized at the expense and responsibility of the professional grouping of dock-work enterprises".

285. In France, there are two categories of dockers:

Regular dockers: who have a status which ensures them a guaranteed wage; and

Occasional dockers: persons who supplement the regular docker gangs if there are not enough workers with regular status.

286. The occupational cards are issued by the port director on the advice of the Central Port Labour Office (BCMO), a joint body consisting of representatives of the cargo-handling firms and of the dock workers.

287. The dock-work regime in France, as in most European States, was set up after the Second World War. In view of the development of shipping conditions and cargo-handling techniques, this regime is now regarded by the French Government as obsolete. It is to be thoroughly reformed in the next few months.

288. In the port of Rotterdam, there is no specific cargo-handling regime. Dock work is practised freely, the only proviso being that the equipment used must have been approved by the port authority.

289. In Spain, dock work is carried out by a State corporation which has, in fact, the form of a semi-public company. The cargo-handlers are capable of doing many kinds of work.

(b) Dockers' working conditions

290. Dock work has to adapt to the evolution of transport techniques and modes. In the past, dockers were recruited for their brawn but nowadays most of them have become machine operators. The change in their work requires greater skills than in the past and entails a certain specialization.

291. The dockers' world has changed; they are now confronted with gigantic equipment. Gone are the days when ships were unloaded with baskets; now powerful gantry cranes are used; heavy cargoes are handled in storage yards by enormous bucket wheels, giant suction elevators are used to unload certain products such as grain, and so forth.

292. The effectiveness of dock work will depend, in particular, on:

The skills of the dock workers and the adequacy of their numbers;

The availability of equipment adapted to the various types of goods and of ongoing maintenance;

Personnel training;

Organization of the work; and

Scrupulous adherence to safety rules.

The need for coordination, which is one of the keys of productivity, should not be overlooked.

293. Cargo-handling work has indeed its own particular rules but, primarily and as a matter of course, it must be carried out with due regard for the port police regulations and where they exist, for the equipment operating regulations.

294. It will be recalled that International Labour Convention No. 152 concerning Occupational Safety and Health in Dock Work, which was signed at Geneva on 25 June 1979 and entered into force on 30 July 1986, also applies. This Convention was prepared and adopted by the International Labour Organisation.

(c) Trends in the legal regime governing dock work

295. In most countries of the world, the trend is towards economic liberalism and dock work has not escaped this. The United Kingdom, Colombia and Thailand have opted for a very advanced liberal regime. Other countries still have a system which is, administratively speaking, very enclosed (e.g. France and Italy) but the situation is evolving under the pressure of the managers of port undertakings who are seeking economic efficiency in a context of increased competition.

296. The case-law of the Court of Justice of the European Communities has recently made a significant contribution to the liberalization of port work. A decision by the Court on 10 September 1991 has made it clear that the principles of the Treaty of Rome apply to this activity, particularly with regard to free competition, the free movement of workers and the prohibition of practices likely to restrict intra-Community imports in quantitative terms.

CHAPTER VI. LIABILITY AND INSURANCE IN RESPECT OF PORTS

SECTION I. LIABILITY

297. Liability means the obligation to provide redress for any damage one has caused. This concept is not necessarily linked to the concept of fault. Liability may arise without any fault having been committed, just as liability may arise in the absence of damage. The law distinguishes three major categories of liability:

Civil liability;

Criminal liability;

Administrative liability.

298. The scope of the liability regime indicates the limits to the right to act. It is not possible to perform any type of activity under any conditions. Awareness of liability is created by the consequences arising from a wrongful act. Liability may signify a heavy financial burden for whoever is liable and, as the case may be, commercial discredit (this mainly concerns the effects of moral liability). If a risk is anticipated, it should be possible to adopt measures to avert it.

299. Port activities are no exception to the rules of liability, and ports are considered danger zones for the public, which is one of the reasons why access to them is often prohibited. The port authority is not the only agency operating in a port, where numerous individuals and undertakings perform a multitude of activities. In ports classified as "landlord ports" and "tool ports", numerous port operations concern, from the legal standpoint, only relations between private undertakings:

Handling firms;

Forwarding agents;

Road hauliers;

Shipowners and their crews;

Industrialists and their employees;

Consignees.

Accordingly, any accident that occurs within a port perimeter does not necessarily involve the liability of the port authority.

First example: a handling firm's crane operator drops a load on to the cab of a lorry: this accident involves only the civil liability of the crane operator's employer.

Second example: while a load is being lifted from a ship by a deck crane, the load breaks loose and injures a dock worker in its fall: the port authority is not liable for the accident.

I. The distinction between the various liability regimes

300. The liability regime may depend on the following:

The nature of the act or circumstance by which the damage is caused (damage caused by public works or resulting from a traffic accident); or

The status of the perpetrator of, or person responsible for, the act by which the damage was caused (a person under private or public law); or

The consequences of the act (whether or not an offence was committed).

301. There is no uniform liability regime among all States. To take the example of damage caused to a wharf by a ship, in France the shipowner would be prosecuted in the first instance before the administrative courts for a breach of Grande Voirie regulations; in Côte d'Ivoire, he might be subject to civil liability under the conditions laid down by the Civil Code, before the civil courts. This is a suitable point to describe the features of the three categories of liability.

A. Civil liability

302. A person is liable when he has to provide redress for damage sustained by another person. In contrast with moral liability, civil liability can only arise from an act (e.g. when a load falls from a lorry and damages a port storage area) or from a failure to act (e.g. failing to reduce a ship's speed when approaching a wharf) and if damage results therefrom (i.e. the loss of property or of an advantage because of another person's act). Civil liability entails redress but not a penalty.

303. Civil liability falls into two categories:

Civil liability arising from negligence or quasi-negligence: i.e. the result of a deliberate or accidental act (e.g. negligence or carelessness);

Contractual liability: this arises from failure to perform or fully to perform a contract, as a result of which the other contracting party suffers damage.

304. There are two possible bases for civil liability: fault and risk.

(a) Fault

- This may be deliberate (e.g. if goods are stored in front of the entrance to a warehouse used by a third party); or

- It may be accidental (for example, failure to apply the handbrake on a lorry parked on a slope).

305. It is possible to commit a fault involving civil liability by exercising a right if the person who perpetrates the act does so with injurious intent. For example, if one vessel is occupying a berth reserved for another vessel,

the captain and crew of the vessel entitled to priority may not assume authority to cut the moorings of the vessel wrongfully occupying the berth in order to tow it onto a sandbank or allow it to drift out to sea.

306. Persons occasionally perpetrate acts of authority in accordance with current legislation without involving the liability of the authority on behalf of whom the measures were taken. For example, in the port of Abidjan, if port officials for reasons of necessity cut the moorings of a vessel whose captain refuses to cast off, the port authority is not liable as the officials are authorized so to act under a regulation, namely, article 23 of the port police regulations. In the absence of authorization under a law or regulation it should always be borne in mind that "no one may take the law into his own hands".

307. Not all the obligations incumbent upon a port authority are set out in the provisions in force; it may accordingly be asserted that not every fault necessarily arises from breach of a provision. An act that causes damage is not systematically the result of a fault; for example, if a vessel runs aground in a port during a violent storm after having left the marked channel, the shipowner may suffer damage not attributable to a fault on the part of the port authority. Conversely, a fault does not always give rise to damage. For example, if a ship's master is provided with an erroneous sounding chart, his vessel may nevertheless not run aground. Assessment of the fault is subjective; in other words, it is necessary to consider the attitude one may rightfully expect from the port authority.

(b) Risk

308. Liability arising from risk is an objective and causal liability, i.e. the attitude of the person liable is not taken into consideration. It is sufficient for the damage to result from an act or from the presence (or use) of an object or structure in the custody of the person held liable.

309. A person may be liable without having committed a fault on account of the third-party risk connected with an activity in which he engages or the existence of property (either movable or immovable) owned by him.

310. The distinction between the grounds for liability (fault or risk) also has consequences as regards the burden of proof; where subjective liability is concerned, in order to obtain redress, the victim is responsible for providing proof of the fault or misconduct that caused the damage; in the case of objective liability, to obtain redress it is sufficient for the victim to prove that the damage he has suffered is attributable to the activities of the defendant 7/ or to property (movable or immovable) in his custody.

B. Criminal liability

311. A person is criminally liable when he commits a specific offence punishable by law (e.g. in the port of Abidjan, launching a vessel without making a prior declaration to the port officials is a third-category offence pursuant to articles 29 and 101 of the port police regulations). This example illustrates that criminal liability arises without any injury having

necessarily been caused to another person. The fine and, if applicable, the prison sentence in a manner of speaking constitute redress for the injury caused to the community (i.e. the established order).

312. Criminal liability ends:

- With the death of the offender;

- With the extinction of the criminal action (i.e. after expiration of the time limit fixed by law, and if no proceedings have begun or no procedural act carried out). The deadline varies depending on the category of offence (serious, ordinary or petty offence);

- With an amnesty: this is a measure generally adopted by Parliament, in particular circumstances, to cancel certain offences committed prior to a date established by law.

The principle of personal liability for punishment means that there is no collective criminal liability.

313. An offence frequently causes injury to another party, in which case both criminal and civil liability arise. For example, if a trawler moors without authorization in the access channel to the port of Abidjan and its presence there causes another vessel to run aground while trying to avoid it, the following types of liability will arise:

The criminal liability of the master of the trawler for breach of article 33 of the port police regulations. The relevant penalty will be a fine for a third-category offence (art. 101 of the police regulations).

Civil liability: either that of the trawlers's master if he owns the vessel or, if not, that of the owner. Civil liability will arise in respect of the owner and crew of the vessel that runs aground (in the example given above) and, where appropriate, the port authority if the latter is involved in salvaging the vessel.

C. Administrative liability

314. In countries where this type of liability exists, it signifies the obligation for a legal entity (public law) (e.g. regional authorities, public enterprises) to provide redress for damage caused by it, or by its representatives, to another person in the course of an activity of an administrative nature or damage caused by public works. Not all damage caused to another person by a public legal person automatically involves its administrative liability.

315. Administrative liability only exists in certain countries, and essentially under two sets of circumstances:

If a fault committed by a public legal person causes damage to another person (e.g. erroneous instructions given by the harbour-master's office on the depth of water in a channel, reliance on which causes a vessel to run aground);

In the case of damage caused by the existence or operation of a public structure (e.g. presence of an unmarked wreck on the bottom of a dock).

316. A uniform liability regime cannot apply regardless of the type of activity performed. It is true that under English law the liability of the administrative authorities is subject, as regards substance, to the common-law provisions on civil liability, although specific conditions are required for civil liability to be invoked.

317. Even when ports are managed by national undertakings, as in the case of Dakar, certain activities are still classified as administrative (e.g. the exercise of police authority). In principle, these activities have no equivalent in the customary relations between private persons. The port management must have sufficient authority to operate the public service, without fear of being held responsible for providing redress for any injury it might cause to others. If they benefit from a public service, users must for their part accept the customary risks to which the functioning of the port community gives rise.

II. Types of damage arising from port activities

318. Even when ports are classified as public industrial and commercial undertakings, there is no uniform liability regime; everything depends on the nature of the activity concerned.

A. Liability under public law in ports

319. In certain countries, the construction and operation of infrastructure works (e.g. channels, docks, wharves) are the responsibility of the public administrative authorities, on the same basis as policing. The resultant liability regime comes under public law.

320. We shall now examine cases in which claims for compensation have been made against a port authority in respect of damage caused by the execution of public works.

(a) Dredging and sounding

321. Channels are considered public works and, as such, the managing authority is required to ensure their normal maintenance. Thus, the presence of unmarked shallows in navigation channels involves the liability of the port authority in the event of an accident to a ship. On the other hand, if the authority demonstrates that it has acted diligently, in particular by proving that recent detailed soundings after dredging operations failed to reveal the obstacle by which the vessel was damaged, the port authority will not be held liable.

322. The conditions under which dredging operations are performed may occasionally cause damage because the site is inadequately marked. It has been held that if a buoy has been placed at the exit from a port during work to widen an access channel and has been shifted some 50 metres by the currents without the users having been informed by a notice to mariners, this constitutes an indication of failure normally to maintain the public work.

(b) Execution of port works and structures

323. The liability of the client (on whose behalf a structure is built) may arise even when the damage is caused indirectly to another party. Such is the case when the raising of a sea-wall shifts erosion or causes sanding-up that damages coastal property. For the owners of neighbouring properties to be entitled to redress for damage caused by the execution of port works, they must have been established there before the works began. In addition, it should be mentioned that the client may invoke the contractor's guarantee if it is established that the latter has, for example, failed to clean the site and that its failure to do so has caused damage to a third party.

(c) Use of channels and docks

324. It should first be pointed out that in some cases the regime applicable to damage caused by public works has an attractive effect when the damage sustained is attributable to erroneous orders or information (e.g. regarding authorization for a vessel to enter port when another vessel is using the same channel in the opposite direction).

325. When an accident is caused by a submerged obstacle in a navigation channel, it is attributable to failure properly to maintain the channel, as a result, in most cases, of the absence of marking or of marking that does not comply with regulations. However, marking is not always mandatory and the State is not responsible for marking channels in which there are no particular nautical hazards and whose limits are indicated on charts. Moreover, there is no need to indicate the presence of hazards outside the zone reserved for navigation. Nautical errors made by ships' masters mitigate the liability of the port authorities or exonerate them. For example, if ships' masters, who are responsible for taking precautions, have been informed of nautical hazards, the accident may not be attributed to failure properly to maintain the public work.

326. In addition to physical hazards, pollution of dock waters also involves the liability of the port authority. Thus, damage caused to the hull of a ship moored at a berth chosen by the captain, in an area where the port authority had warned users of the risks of water pollution is fully attributable to the authority, which alone possessed the means of monitoring and determining the extent of the danger and of prohibiting any ship from berthing there if there was any danger.

327. Although it may not properly be termed pollution, it is not uncommon for lengths of hawsers or lines floating beneath the surface or lying on the bottom of docks to wind themselves round ships' screws and damage them. If the port authority fails to indicate the presence of such debris, it could be held liable in the event of an accident.

(d) Damage caused during berthing and the use of wharves

328. In some countries, the general police regulations for seaports stipulate that no vessel may enter a port or carry out manoeuvres in it without the prior authorization of port officials and supervisors.

329. The authorization given to a ship to enter port confers on it, as it were, a single presumption of navigability based on appearances. When a hull of a ship moored at a wharf is damaged by a sheeting pile jutting out from the bottom of the dock or by a loose mooring buoy, the port authority is held liable.

(e) The liability of the authority responsible for port policing

330. In France, the Council of State has taken the view that the authorities responsible for policing the public domain "are obliged, in accordance with the principles governing the concept of the public domain, to ensure proper use of the latter and, to that end, to exercise the powers conferred on them by current legislation, including the power to refer breaches of highway regulations to the judge, in order to put a stop to unlawful occupation and to remove any unlawful obstructions".

331. The liability of the authority responsible for the special police may exist in the following two cases:

- In the case of serious fault; or
- For risk, namely, when the victim sustains both abnormal and exceptional injury and is therefore entitled to compensation for the harmful consequences resulting from the loss of equality of users vis-à-vis responsibilities.

332. The abnormality may result from the demurrage of a ship (several days) following an order from the harbour-master, for example.

333. The exceptional nature of the injury is characterized by the fact that only the victim or a small group of persons sustain injury (the injury is not exceptional when it is sustained by a whole category of users). An example of the liability of the port authority in connection with its police duties would be damage sustained by a ship during a manoeuvre after it has been ordered by a port official to berth at a place unsuited to the characteristics of the ship.

334. On the other hand, the port authority is not liable for a collision between two ships when the accident is attributable to the ship which, after having received authorization to leave its berth, made its way back towards the wharf without informing the harbour-master of that manoeuvre.

(f) Damage resulting from traffic on port roads

335. In view of the intensity of the activities carried out in a port, visits there involve certain risks; appropriate signs in numerous places carry a reminder of the need for care and caution, but such signs are not always posted.

336. In some countries at a traffic black-spot (in other words a place which has already been the scene of numerous accidents) the port authority should set up appropriate signs and signals. The absence or inadequacy of such a system will render the port authority liable for damage to public works. In

other countries, such as Belgium, erecting road signs in a port is not compulsory, but where signs do exist they must fulfil their purpose, for otherwise the port authority may be held liable.

337. A port authority was held liable following the drowning of a person who, at night, had driven off a ramp that was partly raised, even though no ship was being loaded at the time. It was discovered that the traffic lights near the spot where the accident took place had not been working and that the barrier preventing access to the area had been raised.

338. Another case in which the liability of the port authority was involved was that of an accident in which a sailor fell into a dock while walking back to his ship one dark night in pouring rain and in a strong wind. It emerged from the inquiry that the wharf had not been illuminated and that there had been no life-saving material near the spot where the accident occurred.

B. Civil liability in seaports

339. Even in countries where public law covers many areas, it does not apply to all port activities. The port authority's liability vis-à-vis users, as well as users' liability vis-à vis one another or the port authority, 8/ are subject to the regime of civil liability. In most countries, the regulations governing liability in port matters fall exclusively under civil law, there being no need to draw distinctions according to the nature of the facts or status of the victim.

340. The civil liability of the port authority has certain limitations, and so the State authorization given to store goods in open yards and warehouses does not constitute a storage contract. Consequently, the port authority does not ensure the care or supervision of the goods. It is their owner who covers the risk of theft or deterioration.

341. The cleaning of wharves and storage yards is the responsibility of users. If an accident occurs or fire breaks out due to the presence of debris or rubbish on the ground, it is the persons having an obligation to clean the area who will be subject to civil liability vis-à-vis the victims. Nevertheless, the victims may claim that the port authority was liable, through having failed to ensure that the persons concerned complied with the port police regulations.

342. This involvement of the port authority may be advantageous for victims when the party responsible for the accident is insolvent. Of course, the port authority is entitled to claim against the user (or his insurer) for failure to comply with the police regulations.

343. The liability of the custodian (in the legal sense of the term) of a piece of lifting equipment is not always incurred in the event of an accident. The accident may result, for example, when a crane overturns due to overloading, from a false declaration of the weight of the goods by the forwarding agent.

C. Steps to be taken to avert liability claims

344. As we have seen, it is not sufficient to apply the regulations in force in order to avoid liability claims. Laws, decrees and orders cannot cover all situations in which injury is caused. Moreover, liability based on risk does not cover failure to comply with a law or regulation. What is vital where liability is concerned is behaviour. An awareness of the risks to others is essential and every step should be taken to eliminate or reduce those risks.

345. The prime task is organization. It is the State in the first instance which lays down the port statute and defines the various organs, together with their respective duties. However, a port cannot operate efficiently with the statute alone. According to the decisions taken by the State (public port, privatized port, etc.), appropriate structures are set up to enable the port to function. Decisions to transfer authority must be clear and be taken with a view to efficiency.

346. The director should have competent assistants and ensure that the various services are well organized. The allocation of a wide range of duties to staff should be an economy measure, to be used with caution, for often staff neglect one duty for the sake of another.

347. Preparatory work is of prime importance in preventing the risks entailed by the execution of port work. Technical, economic and legal studies are indispensable. The negative effects of a project should be sought out and efforts made to eliminate them.

348. The choice of facilities is important for safety purposes. Admittedly, the cost of equipment determines this choice to a large degree, but safety must be taken into account. For instance, when a port regularly handles loads of 28 tons, cranes with a higher lifting capacity are required in order to avoid breakage of parts and, as a result, the destruction of the load and possible injury to personnel working in the vicinity.

349. The regular maintenance of facilities and equipment contributes to the port's overall efficiency, and also limits the risk of accidents. For instance, in order to avoid the breakage of lifting cables in cranes and gantries, the equipment should be checked each year, lubricated regularly or replaced. As for wharves, periodic inspection of their walls is essential in order to start any necessary repair work as soon as possible. Any negligence in this area may have very serious consequences (e.g. collapse of a wharf causing a gantry or crane to fall into a dock). The financial loss for the port authority entailed by such an accident can well be imagined, not to mention the cost of rebuilding the wharf, repair or replacement of the gantry or cranes, and the operating losses while the berth is out of use. A decisive factor in eliminating risks is the exercise, enforced if need be - depending on the country in question and, of discipline, warning users against carelessness.

350. It is thus apparent that the port authorities can be held liable not only in cases of failure to comply with laws and regulations. Negligence and lack of foresight on the part of technicians and managers in carrying out their duties may also result in serious damage.

D. Criteria concerning indemnifiable damage and the link of causality

(a) Indemnifiable damage

351. The first requirement for civil or administrative liability is damage, and it has to be indemnifiable damage.

352. To begin with, the damage must be definite, in principle damage that has actually occurred although it may be future damage when it has been established in principle (in other words, the extent can only be determined later or the injury will last some time; for example, disability as a result of an accident).

353. Possible damage is not indemnifiable (e.g. the risk to port installations from the berthing of heavy-tonnage vessels) if the damage has not emerged. However, loss of earnings is indemnifiable (e.g. loss of ship operation), and detention of a ship which has been damaged as result of fault by the port authorities gives rise to compensation. The compensation represents not only the cost of repairing the ship, but also loss of the profit the operator would have made if the ship had not been detained. In court practice, an opportunity to make profits is regarded as part of the operator's assets.

354. Again the damage must be personal, i.e. damage to the person claiming compensation. Someone cannot claim compensation in the event of refusal by the actual victim to seek compensation for the injury sustained. However, a representative of a legal person may claim redress for injury sustained by the legal person. Furthermore, the damage must be direct. Redress for the injury sustained by another party cannot be claimed without authorization.

355. In addition to the above conditions, if the damage is to be indemnifiable it must relate to a lawfully protected interest; in other words, the injured party's right must not be inconsistent with public policy or with morality. For example, if goods are destroyed as a result of the negligence of the port authority's servants, compensation must be paid for the injury to the owner, unless they are smuggled or stolen goods. The person responsible for the damage is not required to compensate for the loss of a right acquired by fraud.

356. There are two categories of indemnifiable damage:

Material damage: harm to assets as in:

Loss of assets (e.g. destruction of equipment or goods);

Loss of earnings (e.g. lost operation for an operator whose ship is detained);

Moral damage: i.e. when there is no harm to the assets, but a right is injured (e.g. harm to the company's reputation or worthiness).

(b) Link of causality

357. The cause of the damage means the reason why the damage has occurred. For example, a lifting cable on a container gantry may break as a result of one of the following causes:

Prolonged use of the cable (a cable's average service life is 4,000-5,000 hours);

Poor maintenance of the cable (no greasing or regular inspection; sea air can rust the core of the cable, particularly if the cable contains plastic fibre, which keeps in the dampness);

Overloading in terms of the cable's lifting capacity (this may happen when there is no load-checker on the gantry or this instrument fails).

358. A link of causality between the damage and the causal act means:

The injured party must establish that there is a relationship of causality between the damage and the act which entails liability under the law (fault, negligence, safekeeping);

The person causing the damage must, to rule out liability, provide evidence of an extraneous cause not attributable to him.

(c) Non-attributable extraneous cause

359. This, depending on the system of liability, consists of:

Force majeure;

Fault of the injured party;

An act of a third party.

360. Force majeure is the result of an unforeseeable, irresistible and insuperable event. These three criteria apply together. For example, force majeure was held to be the cause when a landing pier was destroyed by two barges which had broken free of their moorings in a cyclone.

361. Fault of the injured party relieves, either wholly or in part, the person causing the damage or the custodian of the thing that has caused the damage. A typical example of fault of the injured party is the absence of a watchman on a ship alongside the quay. Both article 12 of the general police regulations of French commercial and fishing ports, and article 22 of the police regulations of the port of Abidjan require a watchman on board. Failure to observe this requirement is an offence and also an extenuating circumstance in regard to the liability of the port authority in the event of damage to a ship without a watchman. It is true that a watchman on board can give the alert in the event of an accident and thus prevent worse damage.

362. An act of a third party relieves the person causing the damage from liability only in certain instances: it does not, in any case, apply when liability is based on risk, unless the act by the third party itself constitutes a case of force majeure.

E. Personal liability and liability for the action of a third party

363. Anyone who commits a fault or is negligent or imprudent usually incurs liability. This is a general principle of law. We have seen how fault or imprudence, if they are to form the basis for liability, need not necessarily be the result of an offence. Sometimes, the laws and regulations stipulate liability for the act of another party, in particular the liability of employers for damage caused by their servants in the performance of their duties. The liability of employers is based on a presumption of negligence in supervising their staff. There is no general liability for the act of another party - only for an exhaustive list of particular legal cases which the judge is not authorized to supplement.

III. Liability of concession-holders for public facilities

364. The system of public equipment exists above all in "tool ports". It is, however, becoming less and less common. A system of authorizing the use of private equipment is more frequently used.

365. In concessions of public facilities as is the case in most French ports, the concession-holder replaces the concession-granter in managing the facilities and takes over the operating risks.

366. Even if the concession is operated in accordance with the requirements that are imposed in practice by the granter, it is the holder who is in charge and assumes liability. He organizes the work and maintains the equipment, takes the decisions to decommission the equipment, either for repairs or as a result of risks from weather conditions (e.g. it is not wise to handle containers during a violent storm). At the financial level, it is the concession-holder who earns the profits from operating the facilities.

367. For all these reasons, liability logically lies with the concession-holder. However, damage may be attributable to the negligence of both the holder and the port authority, in which case liability is shared. When the concession is for the operation of a transport terminal, the rules on liability set out in the Vienna Convention of 19 April 1991 will apply to the terminal operator when the Convention enters into force.

IV. Limitation of shipowners' liability

368. This is not a problem specific to seaports, but when a ship damages harbour works, a twofold procedure may be initiated.

369. To begin with, if the shipowner does not want to admit liability, an action for compensation will be brought against him in court by the port authority. Depending on the country, the action may be one for civil liability (in Côte d'Ivoire, for example), or an offence of Grande Voirie (as in France), which falls under the jurisdiction of the administrative courts. When a final ruling has been handed down and it is against the shipowner, the

port authority submits a claim to the shipowner, who will, where necessary, propose the constitution of a limitation fund. In some countries, the shipowner may abandon the wreck so as not to incur liability (e.g. art. 34 of the Côte d'Ivoire Merchant Marine Code issued pursuant to Act No. 61-349 of 9 November 1961).

370. The regime of limitation of shipowners' liability or abandonment of the wreck falls under maritime law, in other words, under private law.

371. In either case, the port authority may find that its claim ranks after others under a national law defining the status of mortgages and liens (e.g., in France, under Act No. 67-5 of 3 January 1967 on the status of ships and other seagoing vessels, and Decree No. 67-967 of 27 October 1967) or the Brussels International Convention of 10 April 1926 on Maritime Liens and Mortgages (a new convention is being elaborated on this topic - the new convention being prepared under UNCTAD and IMO auspices: see annex).

372. In short, when a ship damages harbour works, the port authority is subject to general law; in other words, it does not benefit from special protection. Accordingly, some ports take out insurance against risks of limitation of shipowners' liability (Le Havre, for example).

What is the justification for limitation of shipowners' liability?

373. The master enjoys such a degree of independence in handling the ship that the principal's civil liability has to be reduced. Professor E. du Pontavice has pointed to a historical basis: in the early days of sea trading there was an association of the master, the shipowner and the cargo owners. In that association, the shipowner contributed the vessel and no more. This rule has survived and in today's legal system, both internal law and international law allow for limits on the shipowners' liability.

374. Following the two Brussels International Conventions of 24 August 1924 and 10 October 1957, the Convention on Limitation of Liability for Maritime Claims was signed on 19 November 1976 and entered into force on 1 December 1986.

375. Under article 2 of the London Convention, liability is limited in the case of, inter alia, "claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways, and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom".

376. Prompt payment of the compensation for damage to works and installations is one of the port authority's main concerns. The authority does not necessarily have the funds to proceed with the work and, in addition, any authorization to take out a loan can often take a long time. Sometimes, for lack of budget resources, the State is not in a position to help finance the work. Payment from the shipowners' liability limitation fund, in countries where such a system exists, may take quite a long time owing to procedural reasons.

377. The port authority may, in such cases, have the ship seized and so bring pressure on the owner not to use delaying tactics in paying up. Furthermore, the advantage of this method in some countries is that it does not break off calculation of the amount of the berthing fee (which is also a second or third-ranking claim).

378. According to Article 3 of the Convention, limitation of shipowners' liability is expressly ruled out, inter alia, in the following cases:

> For claims relating to oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969, or of any amendment or Protocol thereto which is in force;
>
> For claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage.

Article 4 of the London Convention expressly states that "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".

379. In the case of personal fault, the shipowner is prohibited from taking advantage of limitation of liability. In all other cases, he may claim the benefit of limitation for damage caused to harbour works.

380. The liability limitation fund is distributed in proportion to the amount of claims recognized by the fund and arising out of the consequences of the accident. In this regard, under the rules of internal law, claims may be ranked in accordance with the lien involved.

381. In the Netherlands, in the event of damage to equipment in Rotterdam, the port authority requires a guarantee or surety, failing which it does not allow the ship to leave. The surety is of the order of the amount of the damage, plus 10 per cent for procedural costs. In Antwerp, a guarantee from a bank or a P & I Club is required. In Algiers, a surety is required after an inspection; otherwise, the ship is not allowed to leave.

382. In conclusion, the system of liability in regard to seaports is quite complex. It has a basis in law but also in practice. In view of the subjective nature of the appraisal and diversity of the facts, it is difficult to assess the risks incurred by the port authority, since they depend on a number of parameters.

V. The regime applicable to wrecks in seaports

383. Port authorities sometimes find themselves in situations which it is not always easy for them to remedy by legal measures: the seizure of vessels and the presence of wrecks in docks and channels. A shipwreck is generally defined as an object or craft not afloat, which has been abandoned by its owner and which is drifting at sea or in a port or which has run aground. A

wreck represents a navigational hazard and is frequently a considerable hindrance for port operations. A vessel may become a wreck after a serious accident or damage caused by deficient maintenance or prolonged neglect.

384. In the event of an accident, the port authority has in principle no means of imposing preventive measures; it can merely serve notice on the shipowner to remove the wreck by a fixed deadline, failing which it will be removed automatically at his expense if such action is authorized by law. In some countries (e.g. Senegal) the law authorizes the owner of a wrecked ship to abandon it; in this case, no further recourse is possible against him. In other countries (e.g. the United Kingdom), the shipowner may set a limit on the amount of his liability if he is not personally at fault. Thus, the port authority which refloats the wreck will only be able to recover at most the liability limitation fund constituted by the shipowner (unless its claim is concurrent with other claims). Until the wreck has been refloated, the port authority may require it to be marked, in accordance with its responsibility for policing, and subsequently determine how it is to be refloated.

385. In order to prevent prolonged deficient maintenance from transforming a ship into a wreck, the legislation of some countries lays down the conditions under which the port authority and the State may intervene to remedy the situation. Such is the case in France, through Act No. 85-662 of 3 July 1985 relating to measures concerning abandoned vessels and buoyant apparatus in territorial and inland waters.

386. In an emergency, the port authority or State may act ex officio and if a wreck remains abandoned, the minister responsible for the merchant marine may deprive the shipowner of his rights. Moreover, the cargo may be sold and the profits from the sale held on account for a maximum of five years.

387. Because of the severity with which the police regulations intended to prevent wrecks in ports are enforced in some countries, and because of the cost of refloating or destroying them, some shipowners seek sites suitable for wrecks. In general, their choice depends on the goodwill of the local authorities, or on their lack of legal means to prevent ships from being abandoned.

388. The development of harbours where ships may be abandoned constitutes a hindrance for the operation of port facilities and a danger to shipping and in some cases puts substantial berthing zones out of commission. In any case, the presence of wrecks is detrimental to the environment.

389. An international convention would be particularly useful for the developing countries as a means of effectively combating the presence of wrecked ships in their ports.

SECTION II. PORT INSURANCE

390. All entrepreneurial activities entail risks, which if they materialize, cause injury to the firm itself or to a third party. On account of the multitude of activities carried out in ports, the large number of employees who work there, the often considerable volume and diversity of goods stored and the size of the equipment used, ports are zones in which there is a high

risk of accidents. Danger can be considerably reduced by exercising caution and taking preventive measures. It is necessary to anticipate mishaps and to do everything to avoid them.

391. Damage may be caused by the following:

A human act: a fault, an act of carelessness or of clumsiness:

A material act: a technical failure, fall, explosion, fire;

The coexistence of several activities in a single zone;

The fact that several persons perform a single activity.

A risk represents a potential loss, and if it materializes it is likely to disrupt the operation of the firm (or of the port undertaking) or even threaten its very existence. In order to eliminate or mitigate the threat, it is possible to take out an insurance policy, i.e. to have the risk underwritten by a specialized institution, or otherwise to accept the risk, in which case the port becomes its own insurer (as in the case of Rotterdam, for example).

392. In any examination of the subject of port insurance, the following topics must be considered in order:

The nature and scale of the risks of damage;

The means of avoiding them;

The desirable guarantees to avoid having to bear the consequences of the risks should they materialize.

I. The nature and extent of risks in ports

393. A commercial port is an area of intense activity where there are considerable risks of damage. What are these risks?

394. First of all, there are the risks to others created by the activities of the port authority:

During the construction, maintenance or operation of structures and equipment;

In the exercise of police authority.

Then there are the risks to the port authority created by acts of others:

Damage caused by vessels to port structures;

Immobilization of berths by vessels that have been seized;

Damage to equipment caused by users;

Commercial damage resulting from the insolvency of certain users.

Like any enterprise, ports may be affected by accidents such as fires, storms (or even cyclones and hurricanes), earthquakes, lightning, floods, etc.

395. Ports are sometimes responsible for damage and sometimes the victims. In both cases there are financial consequences. A wharf, for example, may be damaged by an old ship belonging to an insolvent and uninsured shipowner; the port authority will have to bear the cost of repairs even though it is not liable. Unfortunately, such a situation is not exceptional; in this example, in addition to the cost of the repairs, the operating loss caused by the blockage of a berth or of specialized equipment used at the berth has to be taken into consideration.

396. Risks are not the same in all ports. The size of the port and the volume of traffic passing through it are factors that need to be taken into consideration, although it is mainly other features that distinguish ports as far as risks are concerned:

- Ports located on estuaries are often exposed to more nautical risks than coastal ports;

- The nature of the goods determines risk: thus there is a fire risk at oil terminals, while ore terminals are mainly affected by accidents connected with handling. Grain terminals cause air pollution and the storage of grains in neighbouring silos gives rise to risks of explosion on account of the accumulation of dust caused by this operation;

- The geological characteristics of channel bottoms may also give rise to risks (e.g. running aground on a sandbank, hitting a rock not detected by sounding);

- The skills of employees, their number and organization of work are factors that have to be taken into account in assessing risks. There is no doubt that accidents will be frequent if the personnel responsible for development work, maintenance or handling are unskilled, especially if their workload is heavy (in excess of safety norms).

Risk assessment is a management tool

397. Three criteria may be used for this assessment:

A technical criterion;

A legal criterion;

A financial criterion.

When work is carried out or a facility operated, every care must be taken to avoid damage to oneself (e.g. breakdown attributable to poor maintenance) or to others.

398. The risk of damage may be assessed through experience (e.g. accident statistics) or professional skill (e.g. knowledge of the weak points of an item of equipment). In defining risks in which uncertain elements are playing an important role uncertainty may be considerably reduced if the port authority or users diligently maintain the equipment and organize work.

399. The risks of damage may be heightened by the operating conditions of a structure or by decisions taken with regard to policing. Thus, if two inflammable products are stored close to one another, the risk is increased (e.g. if sulphur is stored close to a timber depot); the location of goods on wharves and storage yards is the responsibility of the port police and the authority to which the police are answerable will be liable, at least in part, for any consequences of a fire attributable to an unsuitable choice of storage area.

400. From the legal standpoint, control of the range of liabilities constitutes a factor in risk assessment. For example, an autonomous port may grant a concession to a company to set up and operate a container gantry. Unless the concession-holder is insolvent, he will bear the operating risks. In this case, it will not be necessary for the port to include cover for gantry risks in its "occupational civil liability" policy; at most, it will have to ensure that the concession-holder has adequate cover for operation of the equipment.

401. Risk assessment is occasionally more complex than in this example, when the legal relationships between several operators have to be defined and when a technical assessment also has to be made. The extent of the risks depends on the scope of the responsibilities vested in the port authority and in port operators by the relevant laws and regulations.

402. With regard to risk assessment on the basis of the financial criterion, the port authority or port operator sometimes has to answer the following questions:

What has to be insured?

What should be the extent of the insurance?

The replies to these questions necessarily have financial repercussions.

403. It is impossible for a port enterprise to cover all its risks; not only would the premium be extremely high, but it is unlikely that the insurers would consent to provide such cover. Where risk assessment is concerned, the operational hazards resulting from an accident must be taken into account. The immobilization of a gantry crane as a result of breakage of its boom in an accident entails a significant operating loss. When a port warehouse burns down, the rental income is also lost.

404. The port authority must be able to decide if it alone is capable of bearing the consequences of such accidents or if insurance cover is needed. This constitutes the financial risk, which affects both the port authority sustaining an accident and the third parties to whom it causes damage.

405. The examples cited above concern the direct consequences, but the situation may sometimes be aggravated by indirect consequences. For example, the repeated breakdown of specialized equipment is likely to lead to the termination of a regular shipping line serving the port and, as a result, to the closure of the plant formerly supplied by the line.

II. Means of reducing accident risks

406. It is not sufficient to take out an insurance policy in order to remove the burden of risk, in particular because:

Doing so does not eliminate the criminal liability of the port director or directors of undertakings if the case arises;

The greater the risks, the more numerous and costly the accidents and the higher the insurance premiums.

Before taking out an insurance policy a means of reducing accident risks must first be sought; this effort should continue throughout operations, for, when there are serious accidents, insurers often reserve the right to terminate the contract or substantially raise the premium.

407. One of the basic principles that the port authority must follow is to provide users with technically reliable structures and facilities. The design and choice of projects are decisive in achieving this goal; in addition, the companies responsible for carrying out the work must have competent staff. Two remarks may be made on this point:

As contracts only bind the parties, third parties are entitled to ignore the existence of public works contracts and, if they are the victims of an accident, they have the right directly to implicate the owner (i.e. the person on whose behalf the work is being carried out). If the company happens to be uninsured or underinsured and is insolvent, the port authority's claim against it will be ineffectual.

When port authority technicians prepare or help prepare work plans, case-law has consistently shown that, when damage occurs, the port authority shares full responsibility with the company except in cases where the victim was at fault or in cases of force majeure.

408. The reliability of equipment depends on how well it is maintained. The major ports now use computer-assisted maintenance: repairs must be rapid and breakdowns avoided.

409. If it is established that the structure or equipment provided for users is not in keeping with its purpose, the manager is liable in the event of an accident. As soon as equipment can no longer fulfil the function for which it was designed, it should be withdrawn from service, for not only are accidents taken into account by insurers in the accident/premium ratio, but they generally harm the image of the port enterprise. If delays occur in the loading or unloading of ships, the port or terminal concerned is no longer considered to be reliable, and this circumstance is used by shipowners to impose a surcharge. It should be borne in mind that the commercial discredit sustained by a port is not insurable.

410. Another important principle that should be adhered to with a view to reducing accident risks is that of the efficient organization of work. Well-trained teams are needed, with sufficient members; when the work requires action by several companies on the same site, the companies must be informed of working conditions and hold regular coordination meetings among themselves.

411. The port authority should use its policing powers as needed to enforce the existing regulations and avoid accidents. Any failure to do so can render it liable. Safety instructions should be widely distributed and kept up to date in the light of the development of new techniques or changing circumstances.

412. Some port enterprises indicate in the conditions of use of their equipment or in the concession agreements for warehouses and storage yards that they will not be liable in the event of accidents occurring when such equipment is being used. Two remarks may be made about this practice:

In some countries, it is not possible to have full exemption from all liability. It is only possible, in contractual matters, to become exempt from liability for faults which are not grave faults (i.e. unacceptable, very serious errors);

As we have seen, because of the contracts binding only the parties, exemption clauses cannot be used against third-party victims.

413. However, the foregoing should not discourage the port authority from indicating the dangers and urging users to exercise care. If an accident occurs despite this warning, the port authority will not be liable or its liability will be reduced significantly. Insurers, in determining the cover they provide, take account of accident risks but also the safety measures taken by their clients.

III. Taking out insurance contracts

A. Advantage of taking out an insurance contract

414. Except in cases where the law requires an insurance contract to be taken out, it is for each party to decide whether it is advisable to be insured. The decision may be based on various factors:

The high cost of insurance premiums;

The low probability of risk;

The inadequacy of existing contracts for certain specific risks (there is only one company in France that will cover a client port for damage to port structures by ships, and only above the amount of the limited liability fund constituted by their owner).

415. Generally speaking, a decision not to take out insurance is based on a combination of the first two reasons (high cost of premium and low risk). This is a decision that may have serious consequences for the port authority's finances following an accident. As for cover against fire in buildings, it is

unreasonable to insure old structures that will not be rebuilt after an accident, since the insurer does not refund the replacement value of the destroyed premises.

416. It is in the obvious interest of every port authority to take out professional civil liability insurance. Although it is true that in certain countries port handlers do not take out insurance policies, this is a choice that may be affected either by legislative provisions in force in the country concerned that are highly protective of the profession, or by the existence of clauses exempting handlers from liability in the contracts they conclude with the representatives of the owners of the cargo.

417. Major ports such as Antwerp and Rotterdam are not insured, but Antwerp is planning to become insured. Bordeaux has a multiple-risk insurance that does not cover damage relating to the operation of equipment. Le Havre has insurance that covers damage beyond the shipowners' limited-liability fund. In Spain, the five autonomous ports have joint insurance on the basis of civil or public liability.

B. Consulting the insurers

418. After defining the ports' tasks and the corresponding risks, it is the responsibility of these public or private enterprises to decide whether or not to cover themselves against risks of damage for which they might be liable. The first step is to consult several insurance companies. In France, the view has been taken that, because of the specific nature of insurance contracts, public entities are not required to seek competitive bids from insurers, under the conditions set by the Public Contracts Code.

419. The consultation generally takes place with the insurance companies' general agents or brokers (who approach several companies on behalf of their clients). There are some insurance companies that offer comprehensive cover for all risks. The greatest caution is recommended before entering into such contracts because it is essential to know exactly what cover is being offered. Sometimes separate contracts permit better assessment of this cover, and of the risk involved and the price being asked to cover it. Deductibles are often required as well.

420. What is important at the consultation stage is to make it quite clear what the port authorities' tasks are, since insurance companies often have the impression that port authorities conduct all activities within port zones. This is not the case, however; in most ports, cargo handling is undertaken by specialized firms, and the oil companies are responsible for fuel storage.

421. As for grains, they are often stored in silos for which a concession is granted to private firms.

422. Insurance companies are generally consulted in the following way:

(a) In view of the nature and extent of the risks to be covered, it must be determined which companies have sufficient capacity to do this. In practice, this choice is made on the basis of their reputation, since in the

financial sphere insurance companies use the reinsurance system (i.e. they take out their own cover with specialized groups, in particular in the United Kingdom and Switzerland).

(b) Insurance companies may be consulted through the general agents of the companies selected, or through insurance brokers authorized by their clients (the policy-holders) to canvass various companies.

(c) In some countries the national companies have a monopoly on consultation, while in others the services of foreign companies may be used.

Compiling a consultation file:

423. The port authority cannot simply rely on the insurers to determine the risks; it must clarify what it wishes to insure. Naturally it can ask a company for advice, but the port authority itself must define the categories of risk.

For example, a port authority will decide to insure:

Its land-based motor vehicles;

Its professional civil liability;

Its buildings against fire;

Its maritime risks (damage to third parties and hull) for the vessels and small craft it owns;

The specific risks to data-processing equipment (destruction of the equipment or of the information on file, etc.).

424. A consultation file should be compiled for each category of insurance, to be communicated to each insurance agent or broker consulted. For each category of insurance policy, the file should contain the insurable items and/or the desired level of cover.

For example:

Insurance against "fire risks in buildings". The file should contain the following:

List of buildings to be insured (description of the premises and plan indicating their physical location, nature of the materials of which they are constructed, allocation of structures (storage of inflammable or non-inflammable goods, market value of each building at the time of consultation, etc.));

Indication of the level of cover; in other words, the amount of building insurance cover can be limited contractually since a number of buildings will not be rebuilt in the event of an accident;

Indication of the deductible desired;

Explicit description of the nature of the cover envisaged (e.g. cover for fire risks only, or multiple-risk "fire and water damage" and "risks from electrical installations". Should goods and installations located in the buildings also be covered?)

425. "Professional civil liability" insurance. The file should contain the following:

As full a description as possible of the activities carried out by the port authority (in particular the nature and volume of activities);

Details of the special circumstances that might affect the conditions of cover by the insurer (e.g. clauses exempting the port authority from liability in contracts for occupancy of warehouses and storage goods or for rental of public equipment, agreement by users not to prosecute the port authority, increase in risks due to the opening of new terminals);

An indication of the desired level of cover and deductible (if necessary);

Details of any extensions planned.

The file should be sent to the insurers with a letter setting a deadline and modalities of reply (in a double sealed envelope for example); the persons consulted may be asked to propose alternatives to the original request.

The candidate is selected on the basis of several criteria:

The amount of the premium (i.e. how much has to be paid in order to be insured);

The nature and extent of the cover offered, taking into account exclusions or alternative contract proposals;

The efficiency of the company and its agents (on the basis of previous experience or reputation).

C. Management of insurance contracts by the port authority

426. Insurance contracts should be managed flexibly; in other words, a separate contract should be drawn up for each category of risk (e.g. fires in buildings, professional civil liability, damage caused by vehicles, in some countries, sickness insurance and cover for industrial accidents, occasionally specific insurance covering particularly costly data-processing equipment).

427. There are several advantages to diversifying contracts in this way:

Distributing the risk of damage over several contracts enables some insurers to make bids for one or more contracts, which they would not have done if there had been a single comprehensive contract;

If an insurer were to terminate one contract, the cover provided by the other contracts would continue;

A periodic consultation may be held for certain insurance contracts when it does not appear necessary to renew all the policies;

Since consultations are more open in the case of multiple contracts, policy-holders benefit from the effects of competition by obtaining lower rates than in the case of limited consultation.

428. For certain insurance policies, the contract has to be broken down into several "lines". In other words, if the port authority's civil liability is to be insured in the amount of CFAF 2 billion, it is preferable, for example, to take out a first line of CFAF 500 million and a second line of CFAF 1.5 billion. The first line would provide the deductible for the second line, which would enable an attractive rate to be obtained for the second line.

429. The insurance premium depends on the amount of cover, but also on the level of the deductible (i.e. the portion of the damage to be paid for by the policy-holder). On the question of deductibles, a choice has to be made; if an insurance contract is taken out against substantial risks, it is advisable to accept a rather high deductible; if, on the other hand, several small accidents are possible, the deductible should be low, like the level of cover per accident.

430. As regards professional liability, the safest solution is to obtain cover for "all risks with the exception of ...", the exclusions being clearly listed in the insurance contract; anything that is not excluded is covered. Exclusions can be the subject of an additional specific cover; this is the case in particular for machine breakage, which, in principle, is not covered by basic contracts covering professional civil liability.

431. On occasions cover for "machine breakage" is taken out jointly by the port authority and the users (those using the equipment). This approach improves commercial relations by significantly reducing the number of disputes; on the other hand, since users have the feeling that the port's insurance will pay, they tend rather easily to declare accidents whose imputability is doubtful.

432. As we have stated, determination of the level of risk is largely arbitrary; the decision concerning the level of "professional liability" cover should be based primarily on the nature and volume of the activities conducted by the port authority and the amount of equipment. The estimate is influenced by consideration of the fact that liability may be shared with a co-perpetrator or attenuated to take the fault of the victim into account. It should also be ensured that the cover includes physical and financial loss (e.g. operating loss).

433. While the insurance contract is in effect, the port authority does not remain inactive, simply paying premiums and making accident declarations. Even if it has had its buildings and equipment appraised before the "fire risk" or "machine breakage" contract was taken out, it must then periodically (every 5 to 10 years, depending on the contract) conduct a new appraisal or adjust it if the facilities are expanded or reduced. Insurers generally accept a margin of error of about 10 per cent.

434. It is in the policy-holder's interest to have as realistic as possible a valuation of his property, since if it is undervalued, the insurer can apply the rule of proportionality if there is an accident. In other words, he can compensate the policy-holder only to the extent to which the property was actually covered.

435. During the contract, policy-holders should not hesitate to question the insurer about the interpretation to be placed on certain clauses, or ask him to resolve contradictions between a number of clauses or regulations. Any changes in the initial contract are set out in endorsements.

IV. Follow-up of files relating to the settlement of accident claims

436. When there is an accident involving the port authority's liability, it is for the victim to prove that the damage is attributable to the port authority; in principle, the port authority is not obliged to take the initiative in asking for an expert appraisal, which could in some cases reveal unknown defects in structure or equipment (e.g. cracks below the water line in a wharf wall). Even when the damage is covered by insurance, the port authority should follow up the file, in conjunction with the insurer. If necessary, it should contest:

- The principle of the liability being imputed to it;

- The amount of damage for which it is held to be liable.

It should also look for:

- Fault on the part of the victim; or

- Existence of a case of force majeure.

437. As we have seen, the greater the damage the policy-holder causes to others, the higher the future insurance premium will be, with the additional threat that the insurer will terminate the contract.

438. When the port authority sustains an injury, it must try to obtain guarantees of reimbursement by the perpetrator of the damage; for example, if a ship has damaged a port structure, it should request surety (from a bank or insurer); if surety is not forthcoming, and in order to put pressure on the shipowner, it may resort to attachment for preservation of assets.

439. As we have observed throughout this section, managing insurance contracts requires a sound knowledge of port activities. Even though a single department may take on this task, all port departments should cooperate. This is an area where information flow is essential; for example, if a technical department learns of a circumstance aggravating a risk, it should pass on this information to the insurer, if it does not, the insurer may reduce or refuse cover in the event of an accident.

CHAPTER VII. MANAGEMENT OF THE PORT AREA

440. The legal regime relating to land determines the procedures for its use. There is no uniform legal regime covering port land. The situation may vary from one country to another, and from one port to another within the same country. In some cases port areas do not form part of the public domain, while in others they are fully subject to this regime. In France, the public domain is intended for public service or for public use; its occupancy must be consistent with these purposes. One of the characteristics of occupancy of the public domain is precariousness: in other words, its administrator may at any time terminate the authorizations he has granted to third parties for occupancy. This precariousness constitutes a genuine disadvantage for investors, who, despite the terms of their authorization, have no guarantee as to its effective duration.

441. In other countries (e.g. United Kingdom), different principles apply, particularly with regard to occupancy of the port area - which may be the site of unrelated activities - and the precariousness regime, which does not exist.

442. The public-domain regime has the effect of permitting the normal conduct and improvement of port operations; the construction of facilities necessary for the development of activities is unimpeded by the very protective private-property regime. When a port authority wishes to expand a dock, it may at short notice withdraw the authorizations granted in respect of the area in question, without having recourse to the cumbersome expropriation procedure. And if the principle of compensation for withdrawal is not provided for in the authorization, the occupant will, at his own expense, have to demolish any facilities he has constructed and leave the premises without financial compensation.

443. The port authority, as administrator of the public domain, is therefore confronted with the following alternatives: it can have free use of the land placed under this regime or it can have land encumbered by a public-interest condition which to a certain extent deters private investors. The latter are, however, necessary for port activity. The port authority has to take action at two levels: conduct of a land policy, and administration of its domain.

I. Land policy of the port authority

444. Originally the town and the port developed together, and there is today a marked tendency to increase cooperation between the two, particularly with regard to land use. The land strategy is dependent on several factors:

- The changing pattern of maritime traffic;
- The legal status of the port and its domain;
- The development of transport infrastructure (roads, railways, canals, port structures).

Generally speaking, the enactments relating to seaports contain no provisions on the land policy to be pursued; this is left to the initiative of port authorities or the State, as appropriate.

A. Land policy and changes in the pattern of shipping and international trade

445. Previously, goods were unloaded from ships and directly transferred to land or inland waterway transport. This system did not require large storage areas. However, the enormous expansion of international trade has led to the creation of specialized berths, and the increase in shipping has led to the development of broader wharves to ensure the more efficient operation of installations and to facilitate the movement of handling equipment. For about two decades now, the change of strategy within world shipping has had the effect of making turn-rounds shorter, which has made it necessary to create enormous transit areas in the vicinity of wharves.

446. There may be several reasons for the storage of goods in a port: waiting for loading or completion of Customs formalities, the grouping of goods for purposes of the organization of cargoes, and also speculative operations pending a favourable movement in the price of certain goods with a view to their sale and shipment. Many ports are extending the range of services offered for goods and are creating industrial or business parks and even distribution centres.

447. There is no question that international trade and shipping procedures have an effect on the land policy of ports. Port structures have to be adapted to changes in means of transport, and the operation of very large ships frequently entails a modification of berthing facilities or in some cases the construction of facilities on a new site. When the possibilities of extending a port are limited by physical considerations, the port authority is confronted with a choice between maintaining the facilities in their existing form, which technically means that it will be unable to accommodate large-capacity vessels, and adapting the existing facilities, with a resultant reduction in the number of berths. The land potential of a port should enable it to cope with any development, whether technical, industrial or commercial.

448. In France, it was stated in circular No. 75-107 of 30 July 1975 issued by the Minister responsible for seaports: "Relationships between activities already established in a port area and maritime and inland-waterway transport may change radically, and installations must not become an obstacle to the new use of the area equipped and developed through the action of the public body; opportunities must be afforded for the establishment of other activities better able than the previous ones to benefit from the facilities constructed".

B. Land policy in the light of the port's legal status

449. The sphere of action of a port authority is primarily dependent on the instruments which determine the port's status, but also on other instruments; this is the case, for example, with the land policy of the local bodies administering ports which have to act in accordance with the competence conferred on them by law, regardless of the port's status.

450. Today the land policy of bodies corporate is strongly conditioned by planning regulations. In addition, local bodies often have substantial powers, being able to impose their wishes as regards development on port

authorities. The latter must, moreover, have the legal means to carry out their extension or adaptation projects, in particular by means of the expropriation.

451. In Belgium, Germany and the Netherlands, ports are placed under the direct responsibility of municipalities. The development of port areas is therefore covered by the urban development plan.

452. Relations between communes and port authorities require consultation so as to reconcile the various interests involved in the use of port areas. Some of these areas, situated on the edge of urban centres and no longer used for commercial traffic, are transferred with full ownership or on a management basis to municipalities, which use them for the construction of tourist or tertiary facilities.

453. In Hong Kong, the Government is endeavouring to preserve the port area from urban development, being conscious of the area's economic importance. In many cases, the sea ports of cities which are hemmed in by steep and built-up terrain (e.g. Genoa, Algiers) find it very difficult to expand. Rigorous land management and close cooperation with the municipalities concerned are essential if the port is to retain - or be given - a leading role.

454. One last point on land policy. It must be realized that in some countries the proceeds of public-property charges account for about one third of the revenue of large ports, which therefore keep their operating account in balance thanks to the management of the land and in particular industrial parks. It is accordingly necessary for their legal regime expressly to authorize them to manage such parks. If the industrial port areas are delimited, by agreement with the local authorities, their conditions of development should be the responsibility of the administering authority alone, in this case the port authority.

C. Land policy and the development of transport infrastructure

455. The development of a port is closely connected with the transport infrastructure serving it (motorways, other roads, railway network, canals), and the port authority's strategy must take account of this context. Before and after the port becomes involved, the conditions in which goods are transported to the port for loading on a ship or from the port after unloading constitute a factor to be taken into consideration when deciding which port to use. For many countries, even including highly developed countries (e.g. United States), the improvement of the land-based servicing of ports is one of the chief concerns of port directors. The port authority must therefore take into account the development projects relating to access to inland-transport infrastructure when formulating its land policy. To this end, it must either reserve the necessary land, or purchase this land.

456. In this connection, note should be taken of the need for effective coordination between the port authority and the competent public bodies, which will be the clients for the transport infrastructure. Land must not be reserved or purchased too far in advance before a project is worked out in detail; it may happen, for example, that the route of a motorway access road or railway spur will be moved following arbitration between several State agencies or departments.

457. The planning documents constitute valuable future-oriented instruments for the port authorities, which are often associated in their formulation. The port authority plays a dual role: that of developer and administrator of the area entrusted to it. For it to be able to discharge responsibilities in the best possible conditions, it is essential that its statute should guarantee its independence, for it is on this that its effectiveness will depend.

II. Management of the port area

458. In those countries where the concept of public domain exists, the port authority is often given the responsibility of administering land, bodies of water and infrastructure forming part of the domain of the State, which it replaces as regards rights and obligations. It may also be the owner of its own domain. The method of management of the land varies not according to its owner, but because of the distinction between the public domain and the private domain. In other countries, it is the users who own the greater part of port areas.

A. The choice of occupant and of proposed activity

459. In France, the administrator of the public domain is never obliged to grant authorizations for private occupancy. He may directly administer the area concerned o await the arrival of a major investor wishing to undertake an activity that will generate substantial port traffic. The use of the port area is related to the nature of the economic activities in the hinterland. Thus, in a steelmaking region the port authority will establish, or encourage the establishment of, storage areas for ore and coal. In areas where there is considerable agricultural activity, the administrator of the port area will give priority to occupancy for the admission of imported cattle feed and the construction of refrigerated warehouses for the storage of meat products for export. In Malaysia, the regulations prohibit the use of port areas for non-port activities.

B. The choice of occupancy contract

460. Generally speaking, the port authority is free to choose the nature of the occupancy contract (e.g. concession, temporary occupancy agreement, authorization for private equipment with public-service obligation). The choice may be influenced by the need to encourage private financing of facilities or to meet the demand for a potential investor, or the need to exercise strict control over the activity (e.g. for the purposes of the concession regime).

461. In Belgium and the Netherlands, it is possible for the occupant of the port area to grant mortgages on the buildings he constructs. There may be a tax reason for choosing a particular type of contract or a reason related to the enhanced legal protection of facilities (e.g. in France the port facilities covered by a concession are protected by the Police de la Grande Voirie).

C. The coordination of activities undertaken in the port area

462. Apart from the terms of the occupancy contracts based on standard contracts, the port authority in many cases imposes on occupants the obligation to comply with general conditions which contribute to the organization of the area and to the coordination of the activities undertaken there. These general conditions contain clauses relating to the execution of road works, noise control, the definition of priority activities, relations between neighbouring occupants, the establishment and maintenance of the various systems, etc.

D. The determination of port tariffs

463. When the port authority owns or administers land, there is in principle no cumbersome administrative procedure to be followed prior to the imposition of port tariffs; in the case of autonomous port authorities, it is the Conseil d'Administration de l'Etablissement which determines tariffs. In private ports, rents are negotiated between the occupants and the port enterprise. During a price freeze, the charges imposed in ports may be frozen by a general enactment extending beyond the port context. The port authority must not hesitate to consult users before increasing charges because such consultation may reveal anomalies (an excessive increase in tariffs may affect a particular category of user or a particular kind of activity) liable to jeopardize competitiveness.

III. The influence of the tax and Customs regime on management of the port area

464. The use of the port area is nevertheless influenced by the nature and volume of goods traffic, which itself depends on the commercial strategy of the port authority. This strategy is in some cases based on an advantageous tax and Customs regime, and gives rise to the creation of free zones or enterprise zones.

465. Freeport: This is an area of land comprising the entire port area and in some cases the surrounding area, into which foreign products may be imported free of Customs duties, with a view to their processing or forwarding (e.g. Freeport (Grand Bahama), Thessalonika and port of Piraeus (Greece), Tangiers (Morocco), port of Malmö (Sweden)).

466. Traditional free zone: This is often defined as "any territorial enclave created with a view to ensuring that the goods contained in it are considered as not being on the Customs territory for the purposes of the imposition of the Customs duties and taxes to which they are liable by virtue of their importation and of quantitative restrictions". We may cite the example - more than 100 years old - of the port of Hamburg as a free zone, and also the free zone of the port of Lomé (Togo).

467. Free zones: A free zone must be distinguished from other Customs regimes such as transit zones and périmètres francs (free areas):

A transit zone is generally composed of a port admitting imports and serving as a storage centre for distribution purposes. Such a zone facilitates the free transit of goods to a neighbouring land-locked country.

A périmètre franc is similar to a free port, but is situated at some distance from a centre of activity or in a disadvantaged area of the country. Its main function is to meet local consumption needs.

468. The European Economic Community has created free zones and warehouses which are, respectively, parts of the Customs territory of the Community and premises separate from the rest of that territory, where there is generally a concentration of activities relating to foreign trade. These zones and warehouses contribute, through the Customs facilities established therein, to the promotion of these trade activities and, in particular, to the redistribution of goods within and outside the Community. Free ports and free zones are closed, and access to them is controlled by the Customs authorities. The tenure system of industrial or storage premises is in general subject to ordinary law, but special requirements are imposed in order to permit Customs supervision.

469. Lastly, reference should be made to the case of free stores and bonded warehouses. The former are storage areas, either covered or open, for foreign goods pending forwarding. Customs duties on the goods are payable on their departure.

470. Bonded warehouses are intended for goods obtained on the domestic market with a view to their subsequent export. Traders are eligible, in advance, for certain benefits normally relating to actual exports (duty-free invoicing of goods sold abroad and placed in storage, exemption from VAT in the case of certain services, operation included in turnover at the time of export).

471. In some cases, the free-store regime may exist in addition to that of the enterprise zone (which permits the establishment of enterprises which are exempted from company tax for 10 years), as in the port of Dunkirk (France), for example. Although the free-zone and free-store regime is not specific to ports, it may, when applied within the port area, have the effect of encouraging their development and expansion. It is the responsibility of the State to take this into account, knowing that the tax benefits granted will promote job creation and hence national economic development.

Notes

1/ Contains only administrative regulations.

2/ "Anvers - La réponse logistique à l'avenir", Monographie Hinterland 149 F, p. 81.

3/ J. Grosdidier de Matons, "Le régime administratif et financier des ports maritimes", p. 13, L.G.D.J., 1969.

4/ Report on "The main seaports of the Community", prepared by the Working Group on Ports, Commission of the European Communities, November 1986, No. VII/9/87, FR, p. 5.

5/ "Grande-Bretagne - Bilan de l'abolition du Programme National des dockers", Journal de la Marine Marchande, 21 juin 1991, p. 1593.

6/ Carlo Belio, "L'organisation du travail dans les ports italiens", Journal de la Marine Marchande, 21 juin 1991, p. 1595.

7/ The defendant is the person against whom a legal action is brought.

8/ Except in a State where the regime "de la Convention de Grande Voirie" is in force.

Annex I

GENERAL RECOMMENDATIONS ADOPTED AT THE INFORMAL MEETING OF THE GROUP OF LEGAL EXPERTS ON PORT MATTERS HELD IN GENEVA ON 20 NOVEMBER 1991.

The Group welcomes the initiative taken by the UNCTAD secretariat in organizing a meeting of experts to consider the draft study prepared for the secretariat by Mr. R. Rezenthel of the Autonomous Port of Dunkirk and entitled "Legal aspects of port management". As a result of the discussions, a number of general and technical recommendations were formulated on the topic under consideration. The Group nevertheless felt that it would be useful to highlight the following points:

(a) The requirements of international trade mean that commercial ports must widen the range, and improve the quality, of the services offered to users and adopt a system of commercial management. This cannot be achieved satisfactorily without an appropriate legal framework, at both the national and local levels. Generally speaking, a very comprehensive legal framework exists in the statute-law countries such as France, on whose legal system the draft study submitted to the Group is based. Other very different systems are in force in the common-law countries such as the United Kingdom. A third group of countries have opted for an intermediate system, in particular when ports are managed by regional or municipal bodies. The Group considers that each country should develop its own system in the light of its national legislation, and its own requirements and ideas on the duties of the port authority.

(b) The UNCTAD draft paper deals with the main topics which should be taken into consideration in this area. A number of principles and practical advice presented and analyzed in the paper should prove useful in most countries. The Group believes that, once the recommendations made during the meeting have been included in the paper, it will be found extremely useful by legal experts and others responsible for port operations, administration and development.

(c) The Group considers that the legal topics relating to port activities taken up in the study, namely, institutional aspects, funding of work and equipment, policing, operations, liability and insurance, handling and management of the port area, whether publicly owned or otherwise, should be the subject of an international periodic review and exchange of information. It therefore recommends that these topics be retained in the UNCTAD secretariat work programme and that they be considered at a forthcoming session of the intergovernmental group of port experts.

(d) In the specific area of port operation and policing, the Group recommends that each port should adopt its own regulations so as to ensure the smooth operation and safety of its waterways and storage yards, and should

adopt and implement the necessary coercive measures in the event of an offence. It would be desirable to train staff and to take preventive measures as far as possible, so as to avert the need for severe action.

(e) It would be desirable for the Governments involved in drafting international legal instruments which have implications for port activities to make the necessary arrangements to ensure that:

Their representatives are assisted by legal experts on port matters, whenever possible;

They make a point of safeguarding the interests of the authorities and various port operators and not allowing their liability to be involved beyond a reasonable limit;

Port operations are not delayed or halted as a result of legal conflicts involving ships, goods or employees.

(f) The Group appreciated the concerns expressed by representatives of the developing countries. It considers that the legal services of a number of ports in developing countries should be strengthened. It invites the UNCTAD secretariat and other competent national and international organizations to assist in training the necessary legal experts. National, regional and interregional seminars on such topics would be desirable.

(g) It considers that the provisions of contracts drawn up in connection with the granting of loans by financial backers should comply with certain minimum standards so as not to penalize ports unduly in case of unforeseen events.

(h) The definition and role of ports are not always sufficiently clear at either the national or international level. In this connection, and in order to promote port activities relating to trade development, the Group recommends that consideration should be given to the amendment and possible extension of the Geneva Convention of 9 December 1923 on freedom of access to, and navigation in, maritime ports.

(i) Port charges are an essential component of any operating, income and development policy, which ports must have under control.

(j) Ports should have the legal means to ensure that their operations are not disrupted or halted by incidents such as the seizure of ships or the presence of wrecks, abandoned ships or pollutants.

(k) As to the port area, it should be precisely defined, and legal and other measures should be taken to permit and protect its future development, including the formulation of sustainable port development plans.

(l) The regulations relating to the port's liability vis-à vis third parties or users should be specified precisely in order to take account of the specific nature of port activities.

(m) In order to facilitate the management of port risks, the Group expresses the hope that limitation of liability can be instituted for the benefit of ports.

(n) It is hoped that UNCTAD will consider the Group's request for the setting-up of an international association of legal experts on port matters, and that it will do its utmost to achieve this objective in conjunction with the other organizations concerned and the International Association of Ports and Harbours (IAPH)

INFORMAL MEETING OF LEGAL EXPERTS ON PORT MATTERS

18-21 November 1991, Geneva

LIST OF PARTICIPANTS

Name	Title
Mr. Pedro Brito da Silva	Legal Consultant, Port of Lisbon, Portugal
Mr. E.E. Pollock	Consultant on Port Affairs, London, United Kingdom
Mr. R. Rezenthel	Secretary-General and Chief of the Legal Service, Port of Dunkirk, France
Mr. T. Van Dyck	Legal Service, Port of Ghent, Belgium
Mr. F. Suykens	Director-General, Port of Antwerp, Belgium
Mrs. Grace Mouen Njoh	Chief of Legal and Contracts Service, National Ports Office, Cameroon
Mr. Manuel Martin Ledesma	Director, Port of Santander, Spain
Mr. Augustin Bravo Ortega	Secretary of the Executive Board, Autonomous Port of Bilbao, Spain
Mrs. Malika El-Otmani	Legal Director, Moroccan Ports, Operations Office, Casablanca, Morocco
Mr. Marc-Yves Le Garrec	Secretary-General, Autonomous Port of Bordeaux, France, and IAPH representative
Mr. Michel Baux	Chief, Legal Service, Autonomous Port of Le Havre, France
Mr. Robert Bonnet	Chief, Legal and Land Service, Autonomous Port of Marseilles, France
Mr. Menouar Khelifi	Director-General, Port of Algiers, Algeria
Mr. Bedreddine Bouzouidja	Director, Harbour-master's Office, Port of Algiers, Algeria
Mr. Jorge Fernandes	Department of Ports Research, Planning and Development, Angola
Mr. Fernand Gauze	Assistant Administrative and Legal Director, Autonomous Port of Abidjan, Côte d'Ivoire

Name	Title
Mrs. Afifa Layouni	Chief, Legal Division, Tunisian National Ports, Tunisia
Mr. Lami Teksoz	Operations Manager, Ports Department, Turkish State Railways, Turkey
Mrs. Marie-Ines Bredent	General Manager, Autonomous Port of Guadeloupe, and TRAINMAR Coordinator in the Caribbean
Miss Dwynette Eversley	Administrative Officer, Ministry of Works, Infrastructure and Decentralization, TRAINMAR Coordinator, Trinidad and Tobago
Mr. P. Herve	Legal Service, Autonomous Port of Nantes-St. Nazaire, France
Mr. W. de Leeuw	Department of General Legal and Legal/Administrative Affairs, Port of Rotterdam, Netherlands
Mr. Raymond Byl	Regional UNCTAD/TRAINMAR Expert in the Caribbean
Mr. Jacques Cambon	Chief, Ports Section, UNCTAD
Mr. Gary Crook	Economist, Ports Section, UNCTAD
Mr. Carlos Cañamero	Economist, Ports Section, UNCTAD
Mr. Ma Shuo	Economist, Ports Section, UNCTAD

ANNEX II

INTERNATIONAL SOURCES OF PORT LAW

By M.Y. LE-GARREC

Secretary-General of the Autonomous Port of Bordeaux

Representing IAPH at the informal meeting of legal experts on port matters organized by UNCTAD from 18 to 20 November 1991

INTRODUCTION

Maritime transport is essentially international transport. It may accordingly find itself faced with differing and sometimes conflicting national legislation. For this reason the international community felt the need at an early date to develop homogeneous and uniform regulations to ensure the satisfactory development of trade. Since the establishment of the International Maritime Committee, in Brussels, in 1897, numerous conventions on the most diverse subjects connected with maritime transport have come into being.

Whatever the shortcomings of the system (sluggishness of the preparatory process and the slow entry into force of instruments), the international conventions have made it possible to unify a number of regulations and led to greater homogeneity among the national legislations on which they have imposed themselves. As an integral part of the operation of maritime transport, for which they are both the starting-point and the point of arrival, ports, by their very nature, cannot escape the influence of this international legislation. Port management is, to a greater or lesser extent, confronted with the conventions regulating the various aspects of maritime transport. For a port authority, this may give rise to rights, but also to obligations.

1. CERTAIN CONVENTIONS MAY PROVIDE PORTS AND STATES WITH LEGAL MEANS OF PROTECTING THEIR WATERS AND PORT FACILITIES WITH REGARD TO SAFETY, POLLUTION AND EVEN FINANCIAL GUARANTEES

1.1 The conventions adopted in relation to safety of maritime navigation may serve to eliminate substandard vessels. Although this list is not exhaustive, we may cite the following:

The London Convention for the Safety of Life at Sea (SOLAS Convention, 17 June 1960), revised by the 1974 London Convention and supplemented by the Protocol of 17 February 1978 requiring vessels to comply with a number of safety measures;

The London Convention on Facilitation of International Maritime Traffic of 9 April 1965. This Convention simplified and standardized the necessary procedures, formalities and documents to ensure the control of vessels in ports;

The London Convention of 5 April 1966 on load lines;

The London Convention (COLREG) on International Regulations for Preventing Collisions at Sea (rules on signalling and conduct) of 20 October 1972;

The London Convention on the training of seafarers of 7 July 1978;

The recommendation by IMCO of 12 November 1975 relating to procedures for inspections of vessels (in particular, chaps. IV and V);

The Paris Memorandum of Understanding in force since 1982 (supplemented by the international conference of 14 March 1991) which provides for the inspection of vessels by the State in which the port is located and the possibility for a vessel to be detained if it fails to meet the safety and social standards laid down in the international conventions. This, however, is a double-edged weapon, as the port may find itself encumbered with immobilized ships prohibited from sailing, which thus hinder port operations by occupying wharves.

1.2 The conventions for the protection of the marine environment contribute to policing of the sea and waterways. The following may be highlighted:

The London Conventions of 1954 and 1973, and the 1978 Protocol for the prevention of pollution by oil and other substances, which establish procedures to prohibit discharges and punish offending vessels.

1.3 Conventions adopted in respect of maritime claims:

The Brussels Convention of 10 April 1926 relating to maritime liens, and mortgages ranks port dues and other port expenses as liens of the first category. Claims arising out of damage to works are ranked in the fourth category.

This Convention is still in force because the Convention of 27 May 1967 intended to replace it has not come into force, an insufficient number of parties having acceded to it. Its aim was to reduce the number of liens. It ranked port dues in the second category after wages due to the crew, while damage to works were classified as claims attributable to negligence and ranked in the fourth category.

A new convention on maritime liens and mortgages is due to be submitted to a diplomatic conference in 1993. It maintained port claims (port dues) as a second-category lien.

2. HOWEVER, INTERNATIONAL AGREEMENTS MAY ALSO IMPOSE CONSTRAINTS ON PORT AUTHORITIES WITH REGARD TO REGULATIONS AND MEASURES TO BE TAKEN

These constraints are a burden on port management.

2.1 Thus the 1923 Convention on the International Regime of Maritime Ports requires them to provide equal treatment for all vessels. On account of its importance and the long period during which it has been in existence, this instrument should perhaps be amended.

2.2 Pursuant to the 1952 Brussels Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, when the arrest of a ship is ordered by the appropriate judicial authority the port authority shall cooperate by detaining the ship in conformity with the applicable national law. This may considerably hinder the operation of ports, in particular small ports with few berths or a single berth, which are thus immobilized by an unwanted vessel. In some cases, however, arrest may be the means by which the port authority having requested it obtains payment of a claim (port dues, damage).

2.3 Although the conventions on oil pollution (the MARPOL Conventions already referred to, of 12 May 1954, 2 November 1973 and the 1978 protocol) introduce a valuable procedure for the protection of seaports, they also impose constraints which may entail considerable financial burdens for ports. Thus annex I to the 1973 Convention requires ports that accommodate oil tankers to equip themselves with specialized facilities to store petroleum waste and polluted water from the cleaning of tanks and ballast tanks.

Annex II deals with the transport and storage of noxious chemical substances in bulk. It imposes standard regulations to be observed by vessels as well as by port unloading and storage facilities.

Annex III contains similar provisions for harmful substances transported in packaged forms, freight containers, portable tanks or road and rail tank wagons.

Annex IV lays down regulations and makes specific facilities obligatory for sewage from vessels. Lastly, annex V deals with the treatment of garbage from vessels.

All these regulations together make it necessary for ports to carry out substantial investment, failing which they will be unable to accommodate vessels transporting hazardous or noxious substances (HNS), or at least not to allow them to load or unload their cargoes.

3. SOME INTERNATIONAL CONVENTIONS OF A MORE JURIDICAL NATURE, ADOPTED IN RESPECT OF LIABILITY, ARE ALSO LIABLE TO PENALIZE PORTS

3.1 The conventions concerned are those which <u>limit the liability</u> of shipowners:

Brussels Convention, of 25 August 1924, for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels;

Brussels Convention on the limitation of the liability of sea-going vessels of 10 October 1957. This instrument, which amended the 1924 Convention, was intended to replace it. In practice, as certain States parties to the first Convention failed to ratify the 1957 Convention, both Conventions have remained in force;

London Convention on Limitation of Liability for Maritime Claims, of 19 November 1976. This Convention, which revised the system of limitation, represents a fresh attempt at unification. In this respect, it has been no

more successful than the previous one, in particular because of article 4, which makes it virtually impossible to do away with the right of limitation (concept of personal fault committed with intent to cause damage).

At the present time the three Conventions overlap one another, and as a result several regimes for the limitation of liability are still in force (France has ratified the 1976 Convention). However, by allowing shipowners to limit their liability in respect of debts arising from damage caused by them, these various Conventions may heavily penalize ports when they are the victims. In fact, the cost of damage caused to port facilities is often far in excess of the amount of the limitation fund.

3.2 Attention should be drawn to another situation with regard to liability: the damage caused by dangerous substances (HNS). Some types of damage are covered by special international conventions waiving the general conventions on the limitation of liability (this is the case with oil and nuclear materials). However, most dangerous substances still come within the scope of the 1924, 1957 and 1976 Conventions, while the damage they may cause and which may affect ports is out of all proportion to the limitation of liability which the shipowner may invoke.

For this reason, a draft general HNS convention has been under consideration within IMCO, and subsequently IMO, since 1977. A first draft was unsuccessfully considered by a diplomatic conference in 1984. Work has resumed and a new draft is due to be considered by a diplomatic conference in 1994.

3.3 To conclude this question of liability, it should be emphasized that the same rules do not apply to everyone. The port authority that suffers damage caused by a vessel may find that punitive liability limitation is invoked. On the other hand, the port authority is not currently authorized to invoke any limitation for damage that might be caused by its activities. If one considers the number of risks concentrated in a port zone on account of the goods, in particular dangerous goods which pass through it or remain there, as well as those attributable to the industries and activities in that zone, one may easily imagine the uncomfortable position of the port authority which, should an accident occur (damage to property, persons, the environment), will immediately find itself held liable and forced to take action against a third party it considers to be actually responsible for the damage.

The recent Vienna Convention of 19 April 1991 on the liability of transport terminal operators regulates the liability of terminal operators vis-à-vis the goods handled by them. This convention concerns ports in two respects:

When they accommodate terminal operators within the port area; or

When they themselves act as port operators. The convention makes it much easier to hold the terminal operator liable as it transfers the burden of proof from the victim to the person presumed responsible, who is required to demonstrate the absence of fault on his part (in contrast with French law, under which the burden of proof lies with the beneficiary of the service).

However, the convention fortunately allows operators to limit their liability for loss of, or damage to, goods.

This is a first step towards allowing land-based operators, and not merely vessels, to limit their liability. The text nevertheless continues to be limited to:

Damage caused to goods, (it does not concern damage to third parties or to the environment); and

The activity of the terminal operator, thus excluding a considerable proportion of port activity.

4. EUROPEAN LEGISLATION

Lastly, to conclude these observations on the influence which these international instruments may have on port activity, mention should be made of another body of international legislation which is growing rapidly and which, while remaining subject to the international conventions in force, will increasingly affect port management in Europe. I refer to the various European directives which, in one way or another, affect port operation without expressly addressing it.

Recent examples are two draft instruments with a direct impact on port management. First of all, a 1990 draft directive on the liability of providers of services, which relates to damage to persons and private property and, in this respect, concerns passenger ports. This directive shifts the burden of proof for the benefit of the victim and in the last analysis introduces virtual liability, in the absence of any fault, for the provider of a service. In addition, no limitation is possible.

The second example concerns the increasingly numerous instruments on environmental issues, such as the 1989 directive (amended by the European Parliament in 1990) relating to civil liability for damage caused by waste. If damage is caused, this directive provides not only for the liability of the producer whose activity created the waste, but also that of the depositary if he is unable to designate the actual producer (dual risk for ports, which are both places where goods are deposited and responsible for the management of industrial sites). The directive even goes so far as to hold the public authorities liable if it is not possible to identify the person responsible for the damage. In this respect, a public port enterprise might find itself involved.

These two examples chosen from among recent draft legislation show the need for European ports to remain vigilant and attentive to European law.

Still within the sphere of environmental protection, I would add that the Commission of the European Communities is likely to propose a draft directive on the transport of dangerous substances and goods. As the preparation of directives is far more rapid than the formulation of international conventions, the European regulations may well come into being before the new HNS convention.

In conclusion, it may be asserted that ports, which are a subject of domestic law, are nevertheless increasingly influenced by international law through the implementation of maritime conventions, and also of the international agreements on the environment (as in the case of the MARPOL convention cited above, or of the London and Oslo conventions of 1972 on the immersion of wastes.

This aspect should not be disregarded when considering port management and should, moreover, encourage port enterprises to participate in the development of international legislation.